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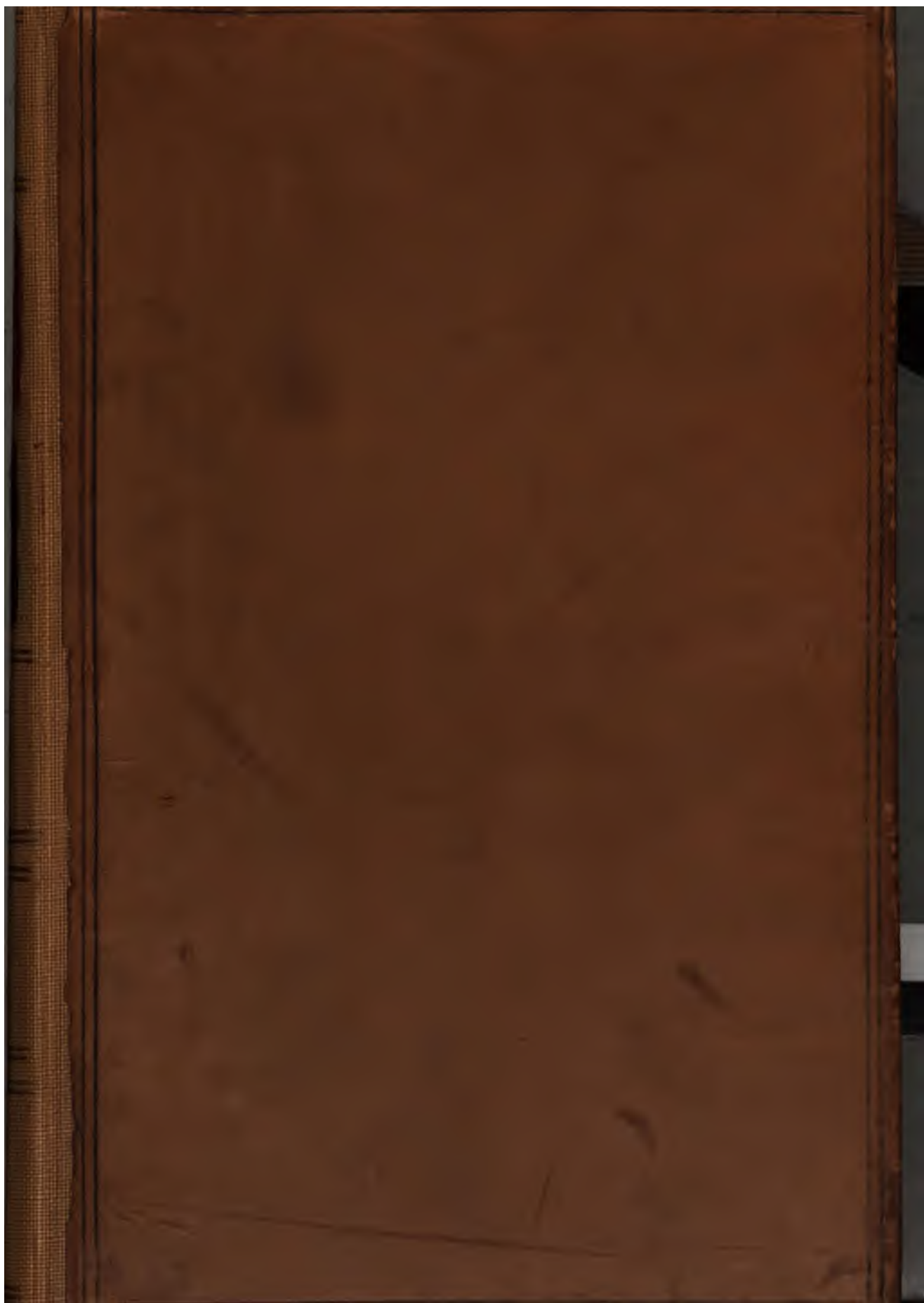
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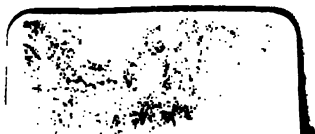
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**REPORTS**  
**OF**  
**CASES IN CHANCERY,**

**ARGUED AND DETERMINED**

**IN**

**THE ROLLS COURT**

**DURING THE TIME OF**

**LORD LANGDALE,**

**MASTER OF THE ROLLS.**

**BY**

**CHARLES BEAVAN, ESQ., M.A.**

**BARRISTER AT LAW.**

---

**VOL. IX.**

**1845, 1846.—9 & 10 VICTORIA.**

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**LONDON:**  
**WILLIAM BENNING AND CO., LAW-BOOKSELLERS,**  
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**1848.**



LONDON:  
SPOTTISWOODE and SHAW,  
New-street-Square.

Lord COTTENHAM, *Lord Chancellor.*

Lord LANGDALE, *Master of the Rolls.*

Sir LANCELOT SHADWELL, *Vice-Chancellor of England.*

Sir JAMES LEWIS KNIGHT BRUCE, }  
Sir JAMES WIGRAM, } *Vice-Chancellors.*

Sir JOHN JERVIS, *Attorney-General.*

Sir DAVID DUNDAS, *Solicitor-General.*



A

# TABLE

OF

## THE NAMES OF CASES

REPORTED IN THIS VOLUME.

A		Page		Page
ADAMS, Rowley v.	348	Bainbrigge v. Baddeley		538
Alderman v. Bannister	516	Bannister, Alderman v.		516
Alsager, Gibson v.	403	Bedson, In re	5.	187
Alvanley, Lord, Hicks v.	163	Bennett v. Cooper		252
Ambrose v. The Dunmow Union	508	Benson v. Lamb		502
Anderson, Salmon v.	445	Bentall, Clifton v.		105
Archdale, Lester v.	156	Biddulph v. Lord Camoys		155.
Armstrong v. Storer	277			548
Arnold v. Arnold	206	Bignold, In re		269
Attorney-General v. Bingham	159	Bingham, Attorney-General v.		159
Corporation of Leicester	546	Blake and Young, In re		209
Corporation of Plymouth	67	Bolton, In re		272
		Bothamley, Clifton v.		105
		Britten v. Britten		143
		Bryant, Ford v.		410
		Bute, Marquis of, v. Harman		320
		Butterworth v. Harvey		130
B		C		
Baddeley, Bainbrigge v.	538	Camoys Lord, Biddulph v.		155.
Badham, Seifferth v.	370			548
		A 3		Carpmael



## TABLE OF CASES REPORTED.

	Page		Page
Carpmael <i>v.</i> Powis	16	F	
Charlie <i>v.</i> Gwynne	319	Farnham <i>v.</i> Herle	302 n.
Charter, Trevelyan <i>v.</i>	140	Farrant <i>v.</i> Nichols	327
Chitty, Hulme <i>v.</i>	437	Field <i>v.</i> Player	302 n.
Chuck, Clark <i>v.</i>	414	—— Whitton <i>v.</i>	369
Clark <i>v.</i> Chuck	414	Fisher, Langley <i>v.</i>	90
Clarke <i>v.</i> Tipping	282	Foljambe, In re	402
Clifton <i>v.</i> Bentall	105	Ford <i>v.</i> Bryant	410
—— <i>v.</i> Bothamley	105	Forman <i>v.</i> Gray	196. 200
Cole, Morrish <i>v.</i>	302 n.	Forth Marine Insurance	
Colquhoun, In re	146	Company, In re	469
Cooper, Bennett <i>v.</i>	252	Foster <i>v.</i> Rayner	302 n.
——, Hodgkinson <i>v.</i>	304	Fyson, In re	117
——, Wiles <i>v.</i>	294	—— Malden <i>v.</i>	347
Cotton, Ex parte	107		
Courand <i>v.</i> Hanmer	3		
Cox <i>v.</i> King	530	G	
Cross <i>v.</i> Kennington	150	General Orders	xi. et seq.
Currie, In re	602	Ghost <i>v.</i> Waller	497
		Gibson <i>v.</i> Alsager	403
D		—— <i>v.</i> Hewett	293
Dancey, Tanner <i>v.</i>	339	—— <i>v.</i> Nicol	403
Davenport <i>v.</i> Stafford	106	—— <i>v.</i> Sturgis	403
Davidson <i>v.</i> Leslie	104	Gillatt, Glazbrook <i>v.</i>	492. 611
Dawson, Stocken <i>v.</i>	239	Glazbrook <i>v.</i> Gillatt	492. 611
De Zichi, Count and Countess of, Marquis of Hertford <i>v.</i>	11	Glendening <i>v.</i> Glendening	324
Dimes, Suckermore <i>v.</i>	518	Gray, Forman <i>v.</i>	196. 200
Dimsdale, Sturge <i>v.</i>	170	—— <i>v.</i> The Liverpool and Bury Railway Company	391
Donovan <i>v.</i> Needham	164	Gwynne, Charlie <i>v.</i>	319
Duncombe <i>v.</i> Nelson	211	—— <i>v.</i> Edwards	22
Dunmow Union, Ambrose <i>v.</i>	508	—— <i>v.</i> Hicks	22
Dunt <i>v.</i> Dunt	146	——, Thomas <i>v.</i>	275
		H	
E		Haldenby <i>v.</i> Spofforth	195
Edward, Gwynne <i>v.</i>	22	Handley <i>v.</i> Metcalfe	495
—— Ramsbottom <i>v.</i>	22	Hanmer, Courand <i>v.</i>	3
		Hardwicke, Lane <i>v.</i>	148
		Hardy, Lockhart <i>v.</i>	349. 379
		Hargrave <i>v.</i> Hargrave	153. 549.
			552
		Harman	

## vii

	Page		Page
Harman, Marquis of Bute v.	320	Langley v. Fisher	90
Harpur, Hedges v.	479	Lasbury v. Newport	376
Harvey, Butterworth v.	130	Leicester, Corporation of,	
Hedges v. Harpur	479	Attorney-General v.	546
Herle, Farnham v.	302 n.	Leslie, Davidson v.	104
Hertford, Marquis of, v. The Count and Countess De Zichi	11	Lester v. Archdale	156
Lowther	266	Liverpool and Bury Railway Company, Gray v.	391
Hewett, Gibson v.	293	Lizardi, Paredes v.	490
Hicks v. Lord Alvanley	163	———, Schneider v.	461
———, Gwynne v.	22	Lockhart v. Hardy	349. 379
Hitchcock v. Jaques	192	Lovell, In re	332
Hodgkinson v. Cooper	304	Lowther, Lord, Marquis of Hertford v.	266
——— v. Wyatt	566	Lucas v. Peacock	177
Hodgson, Turner v.	265		
Horne, Page v.	510	M	
Hotham v. Somerville	63	Malden v. Fyson	347
Hulme v. Chitty	437	Man v. Ricketts	4
Hume, Whicker v.	418	Marriott, Sowdon v.	416
Husband, Ex parte	182	Martin v. Sedgwick	333
J		Metcalfe, Handley v.	495
Jaques, Hitchcock v.	192	Meyer v. Montriou	521
Jodrell v. Jodrell	45	Montriou, Meyer v.	521
Jones v. Powell	345	Mornington, Earl, v. Smith	251
—— v. Roberts	419	Morrish v. Cole	302 n.
—— v. Skipworth	237	Muggeridge v. Sloman	314
K		N	
Kennington, Cross v.	150	Needham, Donovan v.	164
King, Cox v.	530	Nelson v. Duncombe	211
——, Wright v.	161	Newport, Lasbury v.	376
L		Nichols, Farrant v.	327
Lamb, Benson v.	502	Nicol, Gibson v.	403
Lancashire v. Lancashire	120.	Norman v. Stiby	560
259		P	
Lane v. Hardwicke	148	Page v. Horne	570
		Paredes v. Lizardi	490
		Parker	

[illegible]

# TABLE OF CASES REPORTED.

ix

W				Page
	Page			
Waller, Ghost v.	497	Wiles v. Cooper		294
——, Upton v.	497	Williams v. Symonds		523
Walters, In re	299	Wilson, Todd v.		486
Wasney v. Tempest	407	Wool v. Townley		41
Wellington Duke of, Ryves		Wright v. King		161
v.	579	Wyatt, Hodgkinson v.		566
Whicker v. Hume	418		Y	
Whitcher v. Penley	477			
Whitmore v. Sloane	1	Yearwood v. Yearwood		276
Whitton v. Field	369	Young v. Quincey		160



## MEMORANDA.

*ANDREW H. LYNCH*, Esq., one of the Masters in Ordinary, resigned his office on the 25th of *March* 1847, and died on the 13th of *July* following. By the 10 & 11 *Vict. c. 60.*, the number of the Masters in Ordinary was reduced, and the vacancy was not filled up.

*Samuel Duckworth*, Esq., one of the Masters in Ordinary, died in *December* 1847, and *William H. Tinney*, Esq., Q. C., was appointed in his stead.

## ADDENDA ET ERRATA.

- Wordsworth v. Wood*, 2 *Beavan*, 25., was affirmed by the House of Lords. See 1 *House of Lords' Cases*, 128.
- Allen v. M'Pherson*, 5 *Beavan*, 469., was reversed by Lord Lyndhurst, 1 *Phillips*, 193., and afterwards by the House of Lords. 1 *House of Lords' Cases*, 191.
- Strickland v. Strickland*, 6 *Beavan*, 77., was affirmed by Lord Cottenham, 27th January, 1848.
- Vandeleur v. Blagrove*, 6 *Beavan*, 565., was affirmed by Lord Cottenham, 18th November, 1847.
- Stocken v. Dawson*, 9 *Beavan*, 239., was affirmed by Lord Cottenham, 8th February, 1848.
- Bainbrigge v. Baddeley*, 9 *Beavan*, 538., was heard on appeal by Lord Cottenham, who allowed the demurrer for want of parties, but overruled it for want of equity.
- Arnold v. Arnold*, 9 *Beavan*, 206., was affirmed by Lord Cottenham. 1 *Phillips*, 805.
- 7 *Beavan*, 283. line 11, for "Ord. deed" read "Marston died."
- 8 *Beavan*, 464. note (b), for "4 B. & C. 113." read "4 Bro. C. C. 113."
- 9 *Beavan*, p. 170. note (a), for "6" read "4."
- 9 *Beavan*, 378. line 7, for "(a)" read "(c)."

# REPORTS

OF

## CASES

ARGUED AND DETERMINED

1845.

IN

### THE ROLLS COURT.

WHITMORE *v.* SLOANE.

Dec. 15. 22.

**I**N this case, the answer had been filed on the 15th of *August* 1845, at which time the 4th Order of *April* 1828 (*a*) was in operation, allowing two months to except, excluding the Long Vacation.

In a transition case under the Orders of 1845, exceptions were filed one day too late; the Court declined to order them to be taken off the file.

The Orders of *May* 1845, which were made applicable to all existing causes, came into operation on the 28th of *October* 1845, and thereby, the 4th Order of *April* 1828 was repealed (*b*), and six weeks only were allowed to take exceptions. (*c*) These six weeks expired on the 9th of *December*, and on the 10th, the Plaintiff filed exceptions to the answer for insufficiency.

Mr.

(*a*) *Ord. Can.* 6.

(*c*) *Ord. Can.* 284.

(*b*) *Ord. Can.* 273.

VCL. IX.

B



1845.  
WHITMORE  
v.  
SLOANE.

Mr. *Elderton* now moved to take the exceptions off the file for irregularity, on the ground that they had been filed one day too late.

Mr. *Kindersley* and Mr. *Sheffield*, *contrà*, contended that, under the peculiar circumstances of this case, the Plaintiff had two months to file exceptions; that if the Plaintiff had been irregular, it was quite a venial mistake, as it was exceedingly doubtful what was the proper construction of these Orders, and whether, thereby, the existing rights of the Plaintiff had been abridged.

Mr. *Elderton* in reply.

If the Plaintiff can establish a case for filing exceptions after the time, he must make a distinct application for that purpose to the indulgence of the Court; it is no answer to this application.

*The MASTER of the ROLLS.*

I will consider this case, because it may affect others; but if the Plaintiff is too late, I feel every inclination to assist him in setting the matter right. I agree that this is quite a venial mistake.

---

Dec. 22. *The MASTER of the ROLLS* said, that the exceptions had been filed one day too late, but under circumstances venial and accidental. Considering the circumstances, he should make no order and give no costs.

---

The Defendant, however, had time given to elect whether he would submit to the exceptions.

1846.

COURAND v. HANMER.

Jan. 19.

**T**HE Defendant Mr. *Hanmer* had created a number of incumbrances on his living, and a bill having been filed, a receiver had been appointed. (a) Mr. *Hanmer* presented a petition, seeking to charge the receiver on account of various alleged neglects and defaults, but the Master of the Rolls dismissed it with costs.

An adverse application was made against a Receiver, by a party to the cause, which was refused with costs. The applicant being wholly unable to pay the costs: Held, that the receiver was entitled to be indemnified, and have his costs, as between solicitor and client, out of the fund in hand belonging to incumbrancers.

Mr. *Kindersley* and Mr. *Craig*, for the receiver, stated, that the circumstances of the Defendant were such, that it would be quite impossible to recover the costs thus awarded against him. They asked that the receiver might retain the amount of his costs, as between solicitor and client, out of his receipts, and they argued, that he, being a mere officer of the Court, ought to be thus indemnified.

Mr. *Chandless*, *contra*, for an incumbrancer.

Mr. *Turner* and Mr. *Martindale* appeared for the Defendant *Hanmer*, and

Mr. *Smith* for the first incumbrancer.

*The MASTER of the ROLLS.*

I have no doubt that the receiver must be indemnified, and have his costs as between solicitor and client out of the fund.

(a) See the order, *Seton on Decrees*, p. 328.

---

See *Attorney-General v. Lewis*, 8 *Bear.* 179.

1846.

Jan. 23.

## MAN v. RICKETTS.

In the vacation, the Vice-Chancellor heard a motion for the Master of the Rolls, which he refused. Held, that no application for the same purpose could afterwards be made to the Master of the Rolls, even if supported on different grounds from those before the Vice-Chancellor.

THE cause at the hearing is reported *antè* (a), when a decree was made against the Defendant. He appealed to the House of Lords. The cause was attached to this Court, but, in the last long vacation, an application was made, under the 15th Order of the 5th of May 1837 (b), to the Vice-Chancellor of *England*, to stay proceedings under the decree pending the appeal; and the application was refused. It was stated to have been supported, solely on the ground of the irreparable injury which might arise from a sale.

A motion to the same effect was now made before the Master of the Rolls.

Mr. Cooper, who appeared in support of the motion, said, that the present motion was founded on grounds which had not been brought forward before the Vice-Chancellor of *England*. He cited *Waldo v. Caley* (c), and *Willan v. Willan*. (d)

Mr. Kindersley and Mr. Hallett, for the Plaintiff, relied on this preliminary objection: that the Master of the Rolls had no jurisdiction to make any order, in respect of a matter already decided by the Vice-Chancellor of *England*.

The

(a) 7 *Beavan*, 93., and see page 484.  
(b) *Ord. Can.* 118. and see 53 *Geo. 3. c. 24. s. 2.*

(c) 16 *Ves.* 206.  
(d) 16 *Ves.* 215.

*The MASTER of the ROLLS.*

During the vacation one Judge may hear special applications for another, but no order of one Judge can be reheard, for the purpose of being discharged or varied, otherwise than by the Lord Chancellor.

It is said, "that the circumstances now relied on did not form the ground of the decision of the Vice-Chancellor," but the whole matter was before him, and I cannot in any way whatever interfere with his order.

The Vice-Chancellor having made an order in the same matter, I consider that I am not, on any grounds whatever, to be called on to make an order inconsistent with his. The Lord Chancellor alone has power to vary it: I have none.

I think the objection fatal, and refuse the motion with costs.

1846.  
MAN  
v.  
RICKETTS.

*In re BEDSON.*

1845.  
Nov. 5. 7.  
Dec. 17.

THE question in this case was, whether an item of 78*l.* had been properly included in a solicitor's bill which had undergone taxation. It appeared that Mr. and Mrs. *Campbell* had employed Messrs. *Bedson* and Co. as their solicitors in the suit.

As to what items of disbursement are properly included in a bill of costs.

Legacy and probate duties, estimated at 140*l.*, were

payable, in order to make available certain funds in Court. The solicitor, at the request of the client, engaged to pay them, and took a charge on the funds for 140*l.* and interest. The duties, amounting to 78*l.* only, were paid by the solicitor. Held, that that sum formed a proper item in his account on the taxation of his bill of costs.

1845.

*In re*  
BEDSON.

Mr. *Campbell* and his wife being entitled to certain shares of the funds in Court, Mr. *Campbell* was desirous to get the suits terminated.

The funds were charged, or supposed to be charged, with 420*l.* due to *Holmes*, and with 260*l.* due to *Bedson* and *Rushton*, and it was necessary to provide for the payment of the duties for letters of administration and on legacies, which were estimated to amount to 140*l.*

In order to satisfy the purchasers, whose purchase-money constituted the fund, it was also necessary to obtain the delivery up of the securities held by *Holmes*, and by *Bedson* and *Rushton*, and also to pay the duties; and as *Campbell* had not money wherewith to pay the duties, he requested *Bedson* and *Rushton* so to do. They consented on the execution of a certain deed poll, which *Campbell* and his wife agreed to execute.

Accordingly a deed poll, dated the 4th of *December* 1844, was executed by them, and purported to charge the funds in question with the several sums of 420*l.*, 260*l.*, and 140*l.*, and the interest payable thereon respectively.

The duties, instead of amounting to 140*l.* according to the estimate, really amounted to only 78*l.* 14*s.* 5*d.*, which was *bonâ fide* paid, and constituted the item in question.

The bill of Messrs. *Bedson* and Co. having been referred for taxation, the Master taxed the same, and struck off more than a sixth; the costs of the taxation, (54*l.*), became payable by the solicitors. This result was, however, mainly effected, by the Taxing Master first striking out from the bill of costs the item of 78*l.* 14*s.* 5*d.*, considering it one which ought not properly to have been introduced into the bill of costs.

The

## CASES IN CHANCERY.

7

The solicitors presented this petition for liberty to except to the Master's certificate.

1845.

*In re*  
BEDSON.

Mr. *Turner* and Mr. *Prior* in support of the petition, argued, that this sum was properly a "disbursement" within the statute (a). That if the deed had not been executed, it would, unquestionably, have been a proper charge in the bill. That there was no personal covenant in the deed discharging the client's liability; and that a security could not be considered as a payment with respect to which a specific appropriation could be made by a client.

Mr. *Kindersley* and Mr. *Craig*, *contra*, contended, that the Master had properly excluded this item, which had swelled the amount of the bill, and rendered it necessary that a larger amount should be struck off, as one sixth, in order to entitle the client to the costs of the taxation. That this sum, advanced by way of mortgage and at interest, must be considered as money raised and specifically appropriated by the client to the payment of the duties, and, therefore, could not be properly introduced, as an item of charge, in the bill of costs, otherwise, the most intricate mortgage transactions might be brought within the summary jurisdiction upon a taxation.

Mr. *Turner*, in reply.

The cases cited are stated in the judgment.

The MASTER of the ROLLS took time to consider the point.

*The*

(a) 6 & 7 Vict. c. 73. s. 57.

1845.

*The MASTER of the ROLLS.**Dec.*

*In re*  
BEDSON.

The question reserved in this case is, whether the solicitor was entitled to charge the sum of 78*l.* 14*s.* 5*d.*, as a professional disbursement, in his bill of costs against his client.

It has not been disputed before me that the sum in question was, in fact, paid for the client by the solicitor, in the course of his professional employment, and that, in the ordinary course of business, the charge would have been allowed as a professional disbursement.

The objection made is, that the solicitor held a security, under which security, as it is contended, the payment ought to be deemed to have been made, and, therefore, that it ought not to have been introduced into the bill of costs.

It was argued, that, by the effect of the deed poll, the money ought to be considered as raised and appropriated for the specific purpose intended, and that, treating the money secured as money placed in the hands of the client for that purpose and immediately applied, it ought not to be considered as a disbursement to be introduced into a taxable bill.

The authorities, on the question what disbursements are properly to be introduced as items into taxable bills, are very few, and do not, I am afraid, lead to any satisfactory conclusion.

In *Hindle v. Shackleton* (a), a sum of 65*l.* 10*s.* 6*d.*, given by the client to the attorney to be disbursed in fees

(a) 1 *Taunt.* 536. (1809).

fees to counsel, and which was so applied, was held to be properly introduced into the bill as a disbursement. These fees, as was observed in another case, were costs in the cause.

1845.

*In re*  
BEDSON.

In *Woollison v. Hodgson (a)*, the Defendant paid the amount of the debt and costs to his attorney, who paid it to the Plaintiff. It was said, that the cause was at an end, that the sum was specifically received and paid over as directed, and that it ought not to be inserted in the attorney's bill.

In *Hays v. Trotter (b)*, the question was not decided. The attorney did not, at first, treat as a disbursement to be charged in his bill, the payment which he had made, out of a larger sum, which the client had given him for a particular purpose ; but with a view to the costs of taxation, he wished to introduce it afterwards, and this was not allowed.

In *Franklin v. Featherstonhaugh (c)*, it was held, that an attorney was authorised to insert in his bill, the amount paid to a proctor employed by him for his client, and it was said to be the constant course, to consider disbursements of this description as properly forming part of an attorney's bill.

In *Harrison v. Ward (d)*, it was held, that an attorney had a right to introduce into his bill disbursements made by him for his client, although he had no discretion as to their amount, if there was no specific appropriation of money paid by his client to him for such

(a) 2 *Dowl.* 360. (1834).

(c) 1 *Ad. & El.* 478., 3 *Nev.*

(b) 5 *Barn. & Ad.* 1106., 3 & *Man.* 779.

*Nev. & Man.* 174. (1834).

(d) 4 *Dowl.* 39. (1835).



1845.  
  
*In re*  
 BEDSON.

such disbursements. In giving judgment in this case, Mr. Justice *Coleridge* refers to *Woollison v. Hodgson*, as shewing, that if a particular sum be given by the client to the attorney to make a specific payment, over the amount of which the attorney had no discretion, and, therefore, was to act as a mere conduit pipe, that would not properly be a disbursement which ought to be introduced as a taxable item in the bill. This was the case principally relied on in the argument for the client.

I have not met with any other authority on the subject, and none of those which I have mentioned are applicable to the present case, and regarding the circumstances of the present case, I am of opinion, that charging a sum on a fund is not raising it, and that payment on the credit of a charge cannot amount to a contemporaneous raising and appropriation; and further, that giving security for an estimated sum, greater than the sum which ultimately proved to be necessary, cannot be deemed to be, or treated, as the specific appropriation of a particular sum for the required purpose.

It is obvious, that solicitors may improperly escape the costs of taxation, if they are allowed to charge, as disbursements, payments which ought not to be introduced into their bills of costs, and it is very necessary that due attention should be given to the subject, when the circumstances require it; but in this case, it is not denied, that the sum in question would have been properly introduced into the bill, if the security had not been given. I am of opinion, that this security does not deprive the attorney of his right to treat it as a disbursement, and that the solicitor's liability to have his bill taxed or moderated cannot be destroyed, by his  
 having

having taken a security for the payment of disbursements.

1845.

*In re*  
BEDSON.

The security, if good for any thing, could only be good for what should appear to be due on the taxation or moderation.

On the whole, therefore, I am of opinion, that the 78*l.* 14*s.* 5*d.* ought to have been retained in the bill, and that with reference to that, it must be referred back to the Master to review his report.

The Marquis of HERTFORD v. The Count and Countess de ZICHI.

June 30.  
July 3.  
Nov. 5.

**T**HIS case came on, upon a demurrer filed by the Count and Countess de *Zichi* to a bill filed by the Marquis of *Hertford* under the following circumstances :

The late Marquis of *Hertford*, by various codicils to his will, bequeathed to the Countess de *Zichi* legacies amounting to 86,000*l.*, and also certain property at *Milan*. (a) He had also in his lifetime made a settlement of 10,000*l.* on the Countess (b), and had given her very considerable sums of money as advancements.

It is perfectly settled, as a general rule, that a pecuniary legatee is not a necessary or proper party to a bill for an account of the personal estate. It is the duty of the executors to protect the estate against improper demands.

In

(a) See *The Marquis of Hertford v. Lord Lowther*, 7 *Beavan*, 1.

(b) See *Countess Berchtoldt v. The Marquis of Hertford*, 7 *Beavan*, 172.

But where a question directly oc-

curred between the residuary legatee and a pecuniary legatee, which it was found impossible to determine in a general administration suit, and a suit was afterwards instituted by the residuary legatee against the pecuniary legatee and the executor to determine it, a demurrer by the pecuniary legatee, on the ground that he had improperly been made a party, was, under the special circumstances, overruled.

1845.  
  
 The Marquis  
 of HERTFORD  
 v.  
 The Count  
 and Countess  
 de ZICHI.

In a bill filed by the present Marquis, who was the residuary devisee and legatee of the late Marquis, for the general administration of the estate of the late Marquis (to which the Countess de Zichi was no party), a question arose, whether any of the large legacies, thus bequeathed to the Countess by the late Marquis, ought to be considered as adeemed or satisfied altogether or in part; but it appeared, upon the argument of exceptions to the Master's report, that the questions could not be determined in that suit, and the cause stood over for the parties to adopt such proceedings as they might be advised were proper. (a)

Under those circumstances, the Count and Countess de Zichi filed a bill, marked with the name of the Vice-Chancellor *Knight Bruce*, against the executors, without making the present Marquis a party. To that bill the executors objected, that the residuary legatee was not a party, and the objection was allowed.

On the other hand the present Marquis filed this bill, not only against the executors, but also against the Countess de Zichi and her husband, and thereby he insisted, that the testator stood *in loco parentis* towards the Countess, that the settlement and advancements were to be taken in ademption and satisfaction, *pro tanto*, of the legacies, and also that some of the legacies were given in substitution for others previously bequeathed. The bill prayed a declaration of the rights of the Plaintiff, that all necessary accounts might be taken, and for an injunction to restrain the Countess from proceeding to recover the *Austrian* bonds, &c., to which it had been declared she was not entitled. (b)

To

(a) Rolls, Feb. 17. 24, and  
 1 March 1845.

(b) See *The Marquis of Hertford v. Lord Lowther*, 7 Beav. 1.

To the present bill the Countess *de Zichi* and her husband demurred, alleging that the Plaintiff was not entitled to any relief or discovery against them.

1845.

The Marquis  
of HERTFORD

v.

The Count  
and Countess  
de ZICH1.

Mr. *Turner* and Mr. *Tripp*, in support of the demurrer. The only relief asked by the bill, exclusive of the injunction, is for a simple declaration of right. This is a species of decree which this Court will not make. A legatee cannot be made a Defendant to an administration suit, nor can one legatee sue another in respect of his legacy. It is the duty of the executors to resist all improper claims made against the estate. On similar principles, if a legacy be improperly paid, the residuary legatee cannot maintain a suit to make the party refund it (a); he must sue the executor; again a debtor to the estate of the testator cannot be mixed up with an administration suit, *Pearse v. Hewitt* (b): he is accountable to the executor only, unless there be fraud or collusion. Here there is no averment of collusion, or that the executors intend to pay the legacies; it is merely stated, that the Plaintiff is "apprehensive" that they will. Even if the executors did intend and actually did pay the legacies, that could not form a proper ground for supporting this bill, where neither insolvency nor fraud is alleged. If the form of this bill be correct, the residuary legatee might maintain a separate suit against every legatee, disputing their bequests.

Again, it does not appear upon the bill, that the Plaintiff is unable to obtain relief in the administration suit. Even if he were unable, still this ought not to have been an original independent suit, but one supplemental to the former.

As

(a) But see *Consett v. Bell*, 1 Y.  
& Coll. (C. C.), 569.

(b) 7 *Simons*, 471.

1845.  
  
 The Marquis  
 of HERTFORD  
 v.  
 The Count  
 and Countess  
 de ZICHI.

As to the injunction, this Court has no jurisdiction to restrain a foreigner, domiciled abroad, from proceeding in a foreign court of law.

Mr. *Kindersley* and Mr. *Schomberg*, *contra*, in support of the bill. There is no such rule of pleading as that stated on the part of the Defendants. If there were, this is an excepted case, one of peculiar circumstances; it has been found impracticable to determine the questions here raised, except by an independent proceeding, and so these Defendants have themselves thought, by filing their bill in the other branch of the Court. The only persons interested in the question are the Plaintiff and the legatees, and the question will be more conveniently and properly discussed between the parties thus directly interested, than between each separately and the executors. The rule as to debtors has been too broadly stated by the other side: it admits of exceptions; *Bowsher v. Watkins* (a), *Newland v. Champion*. (b)

A residuary legatee has an interest in seeing that no improper payment is made to the pecuniary legatees, as, in case of a *devastavit*, the loss might fall on him; *Ex parte Chadwin*. (c) It is not necessary that the bill should be supplemental; the proceedings in the administration suit are stated and adopted in this bill, so that there is a sufficient connection between them.

It has been declared that the *Polish* bonds did not pass to the Countess *Zichi*; and this Court, in working out its own decision, has sufficient authority to prevent a party proceeding in any other court to recover them; *Bunbury v. Bunbury*. (d)

Mr.

(a) 1 *Russ. & M.* 277.

(c) 3 *Swan.* 380.

(b) 1 *Ves.* sen. 105., and see  
*Lancaster v. Evors*, 4 *Beavan*,  
 158.

(d) 2 *Beavan*, 173.

Mr. *Tripp*, in reply.

1845.

The Marquis  
of HERTFORD

v.  
The Count  
and Countess  
de ZICHY.

1. 5. *The MASTER of the ROLLS.*

I own that the course which, on this occasion, is pursued on the part of the Count and Countess, has in some degree surprised me. I cannot understand how justice is likely to be promoted by it. It is perfectly settled, as a general rule, that a pecuniary legatee is not a necessary or proper party to a bill for an account of the personal estate; it is the duty of the executors to protect the estate against improper demands.

But, having regard to the peculiar circumstances of this case, the former suit, the questions which arose in it, and the difficulty of determining them between the residuary legatee and the executors alone, the position of the parties, and the nature of the questions which are still to be determined, I am of opinion, that the questions are, in this case, properly to be determined between the residuary legatee and the pecuniary legatee, and that the Plaintiff, as residuary legatee and as devisee of the real estates charged, has, in aid of the justice which he asks in the former suit, a right to at least some of the relief which he seeks in this case.

There would, I think, have been no doubt, if the bill had stated, with a little more detail, the proceedings in the former cause, for the purpose of shewing that his proceedings in this cause are auxiliary to the decision of the questions which arose in the former cause. His omitting to do so, in the manner he ought to have done, has given some colour to the grounds of this demurrer, and for that reason, though I overrule the demurrer, I shall do so without costs.

1845.



Nov. 8.

## CARPMAEL v. POWIS.

A solicitor is not bound to disclose professional communications, which took place between himself and his client, although no litigation existed or was contemplated at the time.

The same rule applies to similar communications between the solicitor and a third party, who acts as the medium of communication between the solicitor and client.

A solicitor demurred to interrogatories seeking a discovery of communications between him and *A. B.*, stating, that in such communication "*he considered and treated A. B. as representing his client, and as being the medium of communication between him and his client.*" Held, that he had brought the case within the rule as to protection.

IN 1839, the Defendant Miss *Powis* agreed to sell some property to the Plaintiff for 1800*l.* It was afterwards arranged, that, in lieu of the 1800*l.*, the Plaintiff should grant to the Defendant a life annuity, the amount of which, it was alleged, was to be regulated by that which government would give for a like sum. An inquiry was made on the point, and, ultimately, an annuity of 176*l.* was granted by the Plaintiff to the Defendant.

The Plaintiff, by this bill, alleged, that he had been misled as to the amount of annuity which government would give for 1800*l.*, the calculation having been erroneously taken on a male, instead of a female life; and that he had, consequently, granted a larger annuity than had been agreed. The object of the bill was, either to rescind the contract or rectify the error.

The bill stated a suggestion of the Defendant, that the property had been sold at an under-value, whereas it charged, that instructions had previously been given to sell it by auction, with a reserved bidding of 1800*l.*

The Plaintiff examined a Mr. *Venning*, as a witness, who had acted as solicitor of the Defendant in the matter, and interrogated him, first, as to certain conversations which had taken place between him and the Defendant, his client, as to the amount which had been fixed for a reserved bidding on the contemplated sale of the property

Held, that he had brought the case within the rule as to protection.

perty by auction, and respecting the purchase of an annuity with the purchase money ; and, secondly, as to conversations which took place, on the occasion of the transaction, between Mr. *Venning* and Mr. *Powis*, the Defendant's brother, respecting the annuity proposed to be granted, and the mode of calculating it, &c.

1845.  
CARPMAEL  
v.  
POWIS.

The witness demurred to these interrogatories ; as to the first, because the conversations were confidential communications between the Defendant and the witness as her solicitor ; and as to the second, "because in all his conversations with the Defendant's brother, he considered and treated him as representing the Defendant, and as being the medium of communication between her and himself, as her solicitor."

The demurrer now came on for argument.

Mr. *Kindersley* and Mr. *Malins* for the Defendant, and in support of the demurrer. With respect to the communications which took place directly between the solicitor and his client, it is now expressly settled, that where an attorney is professionally employed by a client, any communications which pass between them for the purpose of that employment, are privileged communications, which the solicitor is bound not to divulge : *Herring v. Cloberry* (a), *Jones v. Pugh* (b).

Secondly, communications with third parties, are also protected, if such third parties act as the medium of communication between a solicitor and his client : *Bunbury v. Bunbury* (c), *Steele v. Stewart* (d).

Mr. *Stevens* for the Plaintiff, argued, first, that the matters inquired after were not those in litigation, but collateral

(a) 1 *Phil.* 91.

(c) 2 *Beav.* 175.

(b) *Ib.* 96.

(d) 1 *Phil.* 471.



1845.  
  
 CARPMAEL  
 v.  
 POWIS.

collateral facts which the solicitor was bound to answer : *Bramwell v. Lucas* (a). Secondly, that there was no sufficient averment, that the communications were confidential and professional, for all that was said was, that the witness "treated and considered" the brother as representing the client, &c., and not that such was the fact ; and that, therefore, the witness had not properly brought himself within the rule : *Sawyer v. Birchmore* (b). Thirdly, that at the time the communications took place, there was no litigation existing or in contemplation ; and that this must necessarily exist, in order to entitle the party to protection ; and, fourthly, that part of the communications were had with the brother, and not with the client, and that there was no protection for such communication, unless some urgent necessity existed, which compelled an intermediate medium of communication.

Mr. *Kindersley*, in reply, referred to *Langley v. Fisher* (c).

The cases of *Parkhurst v. Lowten* (d), *Lord Walsingham v. Goodricke* (e), were also referred to.

*The MASTER of the ROLLS.* I very much regret that there should be so much controversy with regard to professional privilege. I cannot help thinking, that there has been of late years (I think I might safely say within the last twenty years) an extension of that which was formerly considered to be the legitimate protection of communications between parties and their solicitors. The protection has, I must confess, been carried to a greater length than I have been able to satisfy my own mind

(a) 2 B. & C. 745.

(b) 3 Myl. & K. 572.

(c) 5 Beavan, 443.

(d) 2 Swan. 194.

(e) 3 Hare, 122.

mind there are good reasons for, and has, very unfortunately, given rise to a great difference of opinion upon the subject of privilege, and to the controversy to which I have alluded. The matter, however, has to some extent been decided by authority, and it is the duty of us all to give effect to the decisions thereon, though I have no hesitation in saying, that cases arise in which we are still left in some perplexity. However, I am bound to administer the law here according to the best construction that I can put upon the intent and meaning of the authorities applicable to the cases before me.

1845.  
CARPMAEL  
v.  
POWIS.

What are the circumstances? The witness acted as the solicitor of the Defendant, and, in that capacity, had several communications with her. It is proposed to examine this gentleman upon certain matters which took place between himself and his client on those occasions, and it is said by the Plaintiff, *first*, that the transaction, in respect of which it is proposed to examine the witness, is no portion of the transaction in question in the cause. It is, nevertheless, so far treated by the Plaintiff as part of the transaction in question, or as affecting it, that he has thought fit, by his bill, to make allegations on the subject, and he has proceeded to prove them, by endeavouring to obtain the evidence of this witness upon the very matter. I must, of necessity, therefore, consider, that those allegations are of a material character, and I am, therefore, of opinion, that I cannot attend to the first objection to the demurrer, which has been raised in this case.

The *second* objection is, that there is not a sufficient allegation of the confidential and professional nature of the communication which took place between these parties. It was hardly worth while to take such an objection, but, looking at the statement of the witness,

1845.  
CARPMAEL  
v.  
POWIS.

and applying to them the plain principle of common sense, I consider that there is a sufficient allegation that this communication was a confidential communication between the client and the witness, in his character of solicitor. If the statement be untrue, I cannot have the least doubt that the witness will be subject to the severe penalties for the assertion of that which is false.

*Thirdly.* It is objected, that this communication took place as to a matter, respecting which no litigation was contemplated. I consider that this doctrine has been overruled, and that the law has been established otherwise, and I could not hold the contrary, without acting in direct opposition to the case before the Lord Chancellor which has been so frequently referred to in argument. I consider that this was a communication between the solicitor and the client, and that it was of a confidential nature, and that it is not necessary that the matter in respect of which it took place should be a matter either in litigation or in contemplation of that litigation which afterwards occurred. It is proposed to examine this witness in respect of the very matter contained, or supposed to be contained, in that confidential communication. That cannot be done.

The *fourth* point is, that this is the case of an agent. This is a subject of more difficulty than the others. But the witness says, that he received this communication from the brother of his client as representing her, and that he considered and treated him as the medium of communication between himself and his client. I am of opinion upon the authorities that he is not to be called upon to disclose those communications, which, in his view, were confidentially received. It is the privilege accorded to the client that his communication with his solicitor should be in confidence,  
and

and should not be disclosed, and it is the duty of the solicitor to protect that privilege. If the client is content to waive it, and permits the solicitor to speak, then no wrong would be done to the client, by his solicitor disclosing the matters reposed in him, for the solicitor has no privilege personal to himself.

1845.  
  
 CARPMAEL  
 v.  
 POWIS.

Mr. *Stevens* says, "Is this matter to be finally disposed of upon the mere allegations of this gentleman, that he considered this as a confidential communication?" I think not: the demurrer only, and not the cause, ends here. This may be a matter to be considered hereafter, when I know all the points in the cause, and the relative situation of these parties to each other, and the points in respect of which this gentleman's evidence is required. This does not and cannot finally decide the point; it only decides the demurrer; and, considering the whole of the circumstances of this case, I am of opinion that the demurrer must be allowed with costs.

Mr. *Rogers* appeared for the solicitor, but did not argue the demurrer.

Mr. *Stevens*. Both the Defendant and the witness have appeared on this demurrer. The Plaintiff ought not to be saddled with two sets of costs.

*The MASTER of the ROLLS.* Let the costs be according to the ordinary rule in such cases (a).

(a) Affirmed by Lord *Lyndhurst*, C., 25th March 1846, 1 *Phillips*, 687.

1845.



GWYNNE v. EDWARDS.

July 12, 14.  
Nov. 16.

GWYNNE v. HICKS.

RAMSBOTTOM v. EDWARDS.

Generally, the Court leaves the question of rehearing to the certificate of counsel, reserving, nevertheless, its power and jurisdiction, and if the order to rehear be obtained under such circumstances, or in such a manner, that any party has a right to complain, the proper proceeding is to apply to take the petition off the file.

Where a person, not a party to the suit, is desirous of obtaining a rehearing, he must apply for leave to present a petition to rehear.

THIS was a motion made by the Plaintiff *Ramsbottom*, for leave to file a petition to rehear two orders made in the cause of *Gwynne v. Edwards*, one of the orders being made in the month of *May*, and the other on the 27th of *June* 1825.

In the cause of *Gwynne v. Edwards*, the bill was filed in 1807, by *Thynne Howe Gwynne*, on behalf of himself and the other *specialty* creditors of *John Bennett Popkin*, who died in the year 1804, having made a will, whereby "he directed all his just debts to be paid as soon as conveniently might be after his decease."

At the time of his death, he was entitled to the equity of redemption of three several copyhold estates, one of which was mortgaged to *Elizabeth Lewis*; another was mortgaged, together with certain freeholds, to *Albany Wallis*; and the third was mortgaged to *John Landeg*.

The mortgagees, *Elizabeth Lewis*, *Lewis Bayly Wallis*, (the representative of the mortgagee *Albany Wallis*), and

A bill by a creditor, to obtain relief inconsistent with an order in a previous suit, was filed nearly twenty years subsequent to the date of the order, and prayed that the order might be reviewed. An application to rehear the former suit was refused, on the ground of laches, acquiescence, and length of time, but with liberty to renew the application at the hearing of the second suit.

A party who comes in in a creditor's suit, intrusting the management of the suit to the Plaintiff, must, upon an application to review the proceeding, stand in the place of the Plaintiff, and, in the absence of fraud, be bound by his knowledge.

and *Landeg*, were made Defendants to the suit, and the bill prayed the usual accounts, and that the testator's debts, as to any deficiency of the personal estate to pay the same, might be paid by money to be raised by the rents or by sale or mortgage of the real estates; and in case it should be necessary to apply the copyhold estates in payment of the debts, and the same had not been surrendered to the use of the will, it was prayed, that the surrender thereof might be supplied by this Court in favour of the creditors.

1845.  
GWYNNE  
v.  
EDWARDS.

It did not appear that the mortgagees, or any of them, made any objection to being made parties to the suit. *Samuel Hawkins* was made a Defendant to the cause, as claiming an interest in part of the testator's estate, and also as a trustee of the other part thereof; and, pending the suit, viz. on the 16th of *April* 1810, *Hawkins* assigned to *Ramsbottom* and others, under whom the Plaintiff claimed, four several bonds executed by the testator and bearing penalties, which, with the costs, amounted in the whole to 10,572*l.* 14*s.* 9*d.*

The cause was heard on the 8th of *December* 1812. The usual accounts were directed, and, if the personal estate should be insufficient for payment of the debts by specialty, the Master was to inquire what freehold, copyhold, and leasehold estates the testator died seized or possessed of, or entitled to, either in possession or reversion, which were liable to the payment of his debts, and whether such copyhold estates were duly surrendered to the use of his will; and in case the Master should find that the same were not so surrendered, it was declared that such surrender ought to be supplied; and it was ordered, that the customary heir should procure himself to be admitted to such estates, and surrender the same accordingly, except such estates of which the testator was entitled to the equity

1845.  
Gwynne  
v.  
Edwards.

of redemption only, as to which an inquiry was directed. And the Master was to inquire, what mortgages, liens, and other incumbrances there were on the testator's freehold, copyhold, and leasehold estates. And it was ordered, that the freehold and leasehold estates which the Master should find liable to the payment of the debts should be sold.

Under this decree, and on the 14th of *November* 1814, Messrs. *Ramsbottom* claimed to be creditors, by assignment from *Hawkins*, under the four bonds. The establishment of the claim was long delayed, but finally allowed in *January* 1824.

During the proceedings before the Master, the title to the mortgages of the copyhold underwent certain devolutions.

*Elizabeth Lewis* died; her mortgage became vested in *Leyshon Rogers*, who was made a party to the cause; but in the year 1818, he assigned his interest to *Charles Calland*, who claimed to be interested, not only in the mortgage assigned by *Rogers*, but also to be entitled to the equity of redemption.

The mortgage in the freeholds and copyholds, which had passed from *Albany Wallis* to *Lewis Bayly Wallis*, became vested in *Hugh Smith*.

And *Landeg* having died, his mortgage became vested in *Reynolds* and *Vaughan*, or one of them, and they were made parties.

At a period long before the date of the Master's report, a question seems to have been made, whether the mortgaged copyhold estates were liable to the payment of the testator's general specialty debts.

Mr.

Mr. *Hugh Smith*, who had become the owner of *Wallis's* mortgage, made a proposal for receiving payment; and in *November* 1818, an order was made, to take an account of what was due thereon; and, by a separate report, made on the 6th of *July* 1822, it appeared that the sum of 5119*l.* 15*s.* 7*d.* was due; and the testator's freehold estates having been sold for 16,551*l.* 2*s.* 3*d.*, it was ordered that *Wallis's* mortgage should be thereout paid, and this was accordingly done; that is, the mortgage, which was a charge on some freeholds and copyholds, was paid exclusively out of the produce of freeholds. It did not appear that, at that time, any thing was distinctly done or declared as to the liability of the copyholds.

1845.  
GWYNNE  
v.  
EDWARDS.

But after the order of *November* 1818, relating to *Wallis's* mortgage, it seemed to have been assumed, that the copyholds comprised in *Landeg's* mortgage were not liable to the general debts of the testator; for *Reynolds* and *Vaughan* being in possession as mortgagees, an order, dated the 4th of *May* 1819, was made for taking the accounts, applying the rents received in payment of the debt, and ascertaining what was due. It was reported, on the 16th of *August* 1819, that the mortgage debt had been paid or extinguished, and that there remained due from *Reynolds* and *Vaughan* the sum of 46*l.* 5*s.* 11*d.* It was then ordered, on the 1st of *December* 1819, that they should surrender the copyholds into the hands of the lord of the manor to be granted to Mr. *Edwards* and Mrs. *Montgomery*, the devisees under the testator's will. Possession was given to them and was not afterwards disturbed.

In this state of things, *Lewis's* mortgage having been assigned to *Calland*, who claimed the equity of redemption, *Wallis's* mortgage having been paid out of the freeholds, and *Landeg's* mortgage being paid off and the

the



1845.  
  
 GWYNNE  
 v.  
 EDWARDS.

the estate in the hands of the devisees, and all the freeholds having been sold, the Plaintiff proposed, that all the copyholds, or at least those which were comprised in *Wallis's* mortgage, should be sold. Although the proposal comprised the whole, yet no question seemed to have been seriously raised, except as to the copyholds comprised in *Wallis's* mortgage; the Master, to whom it was referred to inquire what freehold, copyhold, and leasehold estates the testator was entitled to which were liable to the payment of his debts, by his report, dated the 20th of *May* 1825, after finding that the testator's specialty debts amounted to 26,472*l.* 17*s.*, stated his opinion to be, that the testator did not die seized or possessed of or entitled to, either in possession or reversion, any copyhold estates which were liable to the payment of his debts, unless the copyhold premises comprised in *Wallis's* mortgage should, (subject to the life interest of *Mary Popkin*,) be deemed liable to such debts, to the extent of 5119*l.* 15*s.* 7*d.*, found due on *Wallis's* mortgage, inasmuch as that mortgage was a charge on both freeholds and copyholds, and had been paid out of freeholds.

This report was duly confirmed, and thereby the liability of the testator's interest in the copyholds comprised in the mortgages of *Lewis* and *Landeg* was, in effect, negatived; and the report was so expressed, as to leave the question as to the liability of the copyholds comprised in *Wallis's* mortgage open for the consideration of the Court, on the hearing for further directions.

The cause was heard for further directions, and the point was argued before Lord *Gifford* on the 27th of *June* 1825. (a) His lordship declared that the copyholds comprised in *Wallis's* mortgage were, subject to the life estate of *Mary Popkin*, liable to the payment of the  
 testator's

(a) 2 *Russ.* 289. n.

testator's debts to the extent of 5119*l.* 15*s.* 7*d.*, which had been paid as before mentioned; and it was ordered that the same copyholds should be sold. The bill was dismissed against *Thomas* and *Rogers*, who had assigned *Lewis's* mortgage to *Calland*, and the residue of the fund in Court was ordered to be apportioned amongst the specialty creditors.

1845.  
  
 GWYNNE  
 v.  
 EDWARDS.

Under that order, the copyholds were sold, and the bill being revived, after an abatement caused by the death of the Plaintiff *Thynne Howe Gwynne* in 1826, the proceeds were applied in payment of costs, and the residue was apportioned among the creditors.

The suit was not wound up till the year 1829, and in the whole, it is said, that the *Ramsbottoms* received no more than the sum of 5589*l.* 14*s.* on account of their debt of 10,572*l.* 14*s.* 9*d.*, leaving no less than 4983*l.* 0*s.* 9*d.* unpaid, and still due to them.

In the meantime, the devisees of *Popkin* claimed, as against *Calland*, to be entitled to the equity of redemption of the estate mortgaged to *Lewis*, and *Calland* resisting their claim, in *February* 1829, a bill was filed to enforce it. *Calland* seems to have offered every opposition in his power, but ultimately, the Plaintiffs succeeded; they established their title to the equity of redemption, and proved that a considerable sum was due to them from *Calland*. (a)

But as their proceedings against *Calland* were growing to a close, *Ramsbottom*, the present Plaintiff, stating himself to be entitled to the debt which was proved in *Gwynne v. Edwards*, and to the sum of 4983*l.* 0*s.* 9*d.* remaining unpaid, filed his bill on the 30th of *August* 1844.

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(a) See *Montgomery v. Calland*, 14 *Simons*, 79.

1845.  
  
 GWYNNE  
 v.  
 EDWARDS.

The bill in *Ramsbottom v. Edwards* alleged, that the copyholds comprised in the mortgages of *Lewis* and *Landeg*, respectively, were and are liable to the payment of the testator's debts, and prayed a declaration to that effect, and consequential relief, and that the Plaintiff might have such relief, notwithstanding the report of the 20th of *May* 1825 and the decree of the 27th of *June* 1825, or any other orders or proceedings in *Gwynne v. Edwards*, and that the same might be reviewed, and might be altered and varied, so far as might be necessary for the purposes of the Plaintiff; and that, for the same purposes, the cause of *Gwynne v. Edwards* might be reheard on further directions on the report of the 20th of *May* 1825, as against the Defendants *Martha Edwards*, *Philip Jones Beer*, and *Elizabeth Ann* his wife, and *Edwin Llewellyn Beer*, and that the Plaintiff might be at liberty to present a petition of rehearing for that purpose, &c. &c.

The bill was amended on the 11th of *November* 1844; the answer was put in on the 2d of *June* 1845; and this motion was soon afterwards made, asking that the Plaintiff might be at liberty to present a petition to rehear the cause of *Gwynne v. Edwards* on further directions, on the report of the 20th of *May* 1825, as against *Martha Edwards*, *Philip Jones Beer*, and *Edwin Llewellyn Beer*.

Mr. *Turner* and Mr. *A. Smith*, for *Ramsbottom*, in support of the motion, insisted, (though this was not the proper occasion to argue it,) that the direction in the will to pay the debts, created a charge, in favour of the testator's creditors, upon his copyhold estates (a),  
 and

(a) *Clifford v. Lewis*, 6 *Mad.* 33.; *Ronalds v. Feltham*, *Turn.* & *R.* 418.; *Graves v. Graves*, 8 *Sim.* 43.; *Douce v. Lady Torrington*, 2 *Myl. & K.* 600.; *Price v. North*, 1 *Phillips*, 85.; and *Jones v. Williams*, 1 *Colly.* 156.

and that, therefore, the creditors were entitled to payment before the devisees could take any thing; and that the orders complained of were erroneous. They argued, that the course adopted by the present Plaintiff was the proper one to obtain the relief to which he was entitled; that a creditor, though no party to a creditor's suit, but who had come in under the decree, might appeal from the decree or rehear the cause; *Giffard v. Hort* (a); and as to the length of time, that though a bill of review could not be brought after twenty years had elapsed from the decree, *Lytton v. Lytton* (b), still the rule did not apply to a rehearing, which had been permitted at a distance of about twenty-four years (c); besides which, this bill had been filed within the twenty years. That it was objected by the answer that there could be no review of the proceedings, unless all the parties to the former proceedings were brought before the Court, but that this was unnecessary, where it was shewn that their rights had been discharged, as by full payment to the mortgagees and by the determination of the life interest.

1845.  
GWYNNE  
v.  
EDWARDS.

Mr. *Spence* and Mr. *Campbell*, in opposition to the motion. This is an application to the discretion of the Court, and must be materially affected by the nature of the different proceedings, the conduct of the parties, and the great lapse of time.

It ought not to be granted, first, because the Plaintiff, having notice of his rights, has, by his acquiescence in the orders, disintitiled himself to the assistance of the Court; and, secondly, in consequence of the great length of time which has elapsed since the orders complained of were pronounced.

First,

(a) 1 *Sch. & Lef.* 409.

(c) 3 *P. Wms.* (6th ed.), p. 8.

(b) 4 *Bro. C. C.* 441., and see note D.

*Redesdale*, p. 88.

1845.  
  
 GWYNNE  
 v.  
 EDWARDS.

First, *Ramsbottom*, who was a purchaser from *Hawkins pendente lite*, stands in his position, and has all the notice which *Hawkins*, who was a party to the suit and had also been the solicitor of some of the parties, had. Again: *Ramsbottom*, coming in as a creditor under the decree, was a *quasi* party, and “must abide by the conduct of the party who managed the cause;” *Hercy v. Dinwoody*. (a) He stands in the position of *Gwynne*, who, in his statement of facts, of the 12th of April 1824, set out the clause in the will directing payment of the testator’s debts.

All the proceedings shew, that the Plaintiff in *Gwynne v. Edwards* had notice of the point now attempted to be raised, and it is not necessary to shew that the party had actual knowledge; in such a case as the present, the question always is, not what the Plaintiff knew, but what, using reasonable diligence, he might have known; *Young v. Keighly*. (b) It is incumbent on the Plaintiff to shew, that he has used due diligence in applying to the Court to correct the alleged error: without that, this Court will do nothing to assist him. Thus, in *Young v. Keighly* (c), it is said, “It is most incumbent on the Court to take care that the same subject shall not be put in the course of repeated litigation; and that, with a view to the termination of suit, the necessity of using reasonable active diligence in the first instance should be imposed upon parties.” The *dictum* in *Hercy v. Dinwoody* (d) is still more applicable to the present case: — “Where a party has laid by for a great length of time, and suffered an estate to be distributed, he shall not have an account. I cannot say that creditors shall come in at any time.”

Secondly.

(a) 4 Bro. C. C. p. 269.

(b) 16 Ves. p. 551.

(c) 16 Ves. 548.

(d) 4 B. C. C. 257. and 2 Ves.  
jun. 87.

Secondly. Length of time alone is an insuperable bar to the Plaintiff. The testator died so long back as 1804; a surrender to the devisees of the copyholds mortgaged to *Landeg* was ordered in 1819, and the order on further directions, now complained of, was made in 1825. It is clear that such delay in bringing forward the claim would have been a bar to the equity if a suit had been instituted after that delay for the purpose of enforcing it; *Gregory v. Gregory* (a), *Roberts v. Tunstall* (b); if so, it must be equally a bar to an application for leave to raise that equity. This bill proceeds on errors apparent upon the proceedings, and the same rule must be applied to it as to a bill of review; but a bill of review for error apparent will not lie after twenty years from the making of the decree; *Smith v. Clay* (c); and it is in the discretion of the Court to give leave to file a bill of review on the discovery of new evidence; *Wilson v. Webb* (d); in which case the leave was refused.

1845.  
GWYNNE  
v.  
EDWARDS.


Another objection is, that the first suit has abated. It is said that the Plaintiff *Ramsbottom* might take up the proceedings, but that could only be done by the permission of the Court; *Houlditch v. The Marquis of Donegall*. (e) The interests of the public, as well as of the parties, require that some limit should be put to litigation, especially where the subject has been so long adjudicated and so long acquiesced in.

Mr. *Turner*, in reply.

*The MASTER of the ROLLS.*—If the Plaintiff, Mr. *Ramsbottom*, be a just and *bonâ fide* creditor of the testator,

(a) *G. Cooper*, 201., and see  
*Hungate v. Gascoyne*, 2 *Phillips*,  
25.  
(b) 4 *Hare*, 257.

(c) 3 *Bro. C. C.* 639.  
(d) 2 *Cox*, 3.  
(e) 1 *S. & St.* p. 494., and see  
*Dixon v. Wyatt*, 4 *Mad.* 392.

1845.  
  
 GWYNNE  
 v.  
 EDWARDS.

testator, it is rather hard upon him that the property which is subject to the payment of his debt should be now in the hands of the devisees, and he excluded; on the other hand, if the devisees have been led into a reasonable and well founded expectation that they were not to be disturbed in their possession of two of the copyholds, one of which was delivered to them by the Court, and the other recovered by them after a long and expensive litigation with *Calland*, it would certainly be hard now to dispossess them of that property.

The testator died in 1804, having three copyholds, which were circumstanced in the manner stated. It is said on one side, that by his will he charged his copyhold estate with his debts; the other side say, that the expressions are such, that the estates were not so charged, and that the parties were so advised by the late Mr. *Bell*, pending the proceedings. (a)

The bill in *Gwynne v. Edwards* was filed in 1807, and the mortgagees were made parties. It is well established that where a mortgagee is made a party to a bill for the administration of the estate of the mortgagor, he has a right to say, that he cannot be brought before the Court except for the purpose of redemption, and he may insist on having the bill dismissed against him. On the other hand, we know that it is not unfrequently done, and if permitted by the mortgagee, it is found to be a very convenient proceeding, in order that the mortgagee may concur in a sale of the property: and besides this, there are other difficulties which are got rid of by that mode of proceeding.

When *Gwynne v. Edwards* came on for hearing, the Court directed accounts to be taken, and an inquiry of what

(a) *March*, 1825.

what freeholds or copyholds the testator was entitled to which were liable to the debts. The form of this decree, therefore, naturally implies that there might have been some which were not liable. The question, then, was fairly open under the decree.

1845.  
GWYNNE  
v.  
EDWARDS.

In the course of the suit this proceeding took place, which is very important. In *December* 1819, the Court ordered the balance due from the mortgagees (who represented *Landeg*) to be paid to the devisees, and a surrender to be made to them of the copyholds comprised in *Landeg's* mortgage. By the act of the Court, therefore, these estates were withdrawn from the cause, and possession was given to the devisees. *Primâ facie*, one can hardly look at the transaction as any thing but an intimation of opinion of the parties, that the devisees had a right to the estate, free from the debts. I do not say that this bound them altogether: an order on petition could not do so: but if that order was made with the acquiescence of the parties, cognizant of their claims, and was acted on from that time to the present, then, although it may not be an absolute bar to their right, yet, it must have very great weight upon an application to alter that disposition. It could not well have been made adversely, and the Court must clearly see that it was not made by some species of arrangement between the parties. It bears that appearance, though I am not satisfied that such is the clear result of this matter.

A great many objections have been raised to this application, and in reference to one, I should observe, that, although this Court does ordinarily leave the question of rehearing to the certificate of counsel (*a*), yet it is a matter

(a) See *Cunyngham v. Cunyngham*, 1 *Ambler* (*Blunt's* ed.), p. 90.; *Attorney-General v. Brooke*, 18 *Ves.* p. 325.; *East India Com-*  
*pany v. Boddam*, 13 *Ves.* p. 425.; *Scarisbrick v. Lord Skelmersdale*, 4 *Y. & Col.* p. 106.



1845.  
  
 GWYNNE  
 v.  
 EDWARDS.

matter over which this Court never parts with its power and jurisdiction; and if the order to rehear be obtained, under such circumstances or in such a manner that any party has a right to complain, the proper proceeding is to apply to take the petition off the file, and the Court must then take into its consideration the whole circumstances of the case. On the other hand, in cases like the present, where the person desiring a rehearing is not a party to the suit, but is a mere creditor, who has come in under the decree, the party is obliged to ask permission to enable him to file a petition of rehearing, and on such an application, the Court is necessarily bound to look at the circumstances of the case.

Another objection is the lapse of time. The decree on further directions was made in 1825, and, therefore, nearly twenty years previous to the last bill being filed. It is said that there is no limit as to the time for obtaining a rehearing. I do not know what authority there is for that proposition; I know, indeed, that by a General Order (*a*) of this Court, the time is extremely limited; and that a party is obliged to present his petition of appeal within a month after the decree has been pronounced. However, in one case (*b*) Lord *Eldon* said, that the Court had so long deviated from that limitation, that he was not justified in ordering a petition of appeal to be taken off the file on that ground. I am not aware that any other time has ever been fixed for presenting petitions of appeal, nevertheless I cannot think it immaterial, that so long a time has elapsed under circumstances shewing that *Ramsbottom* knew what was going on.

After

(*a*) See Order of 5th June, *Ves.* 550.; *Davenport v. Stafford*, 1725; *Sand. Ord.* 506.      8 *Beavan*, 503.

(*b*) See *Wood v. Griffith*, 19

After all, the question comes to this, whether the decree was not necessarily made with the acquiescence, nay, at the suggestion of the Plaintiff *Gwynne*, in whose place *Ramsbottom* desires to place himself. I will read the bill, the state of facts, the pleadings, and, if it should turn out that the circumstances are such as to warrant the fair inference that the decree, whether erroneous or not, was taken, not only with the acquiescence but at the suggestion of the Plaintiff, and with such knowledge as appears from his state of facts, I think I ought not then to grant this application of *Ramsbottom*, who desires to stand in the place of *Gwynne*, without which he would have no *locus standi*. I do not think the lapse of time is to be left out of the question.

1845.  
GWINNE  
v.  
EDWARDS.

Feb. 16. *The MASTER of the ROLLS.*

The Defendants opposed this motion on several grounds, alleging, amongst other things, that the present bill is filed under such circumstances, that the Plaintiff is entitled to no relief under it; and that the foundation of the present claim, being an alleged general charge of debts, if the same be well founded, all the proceedings in *Gwynne v. Edwards*, and not only those of which the Plaintiff now complains, are erroneous, and ought, if necessary, to be reviewed, and that if the same were reviewed, nothing would, in fact, appear to be due to the Plaintiff; but the point principally relied on by the Defendants was, that the Plaintiff has, by his own laches and the great length of time which has been permitted to elapse, deprived himself of all right to any relief, or any indulgence of the Court, in respect of the matters complained of in his bill.

1845.  
Gwynne  
v.  
Edwards.

From the beginning of the year 1820, the Defendants, or those under whom they claim, have, under an order of the Court, been in the unqualified and undisturbed possession of the estates comprised in *Landeg's* mortgage.

They have recovered the estates comprised in *Lewis's* mortgage from *Calland*, who obtained possession by assignment from *Rogers* in the year 1818; and, as against *Rogers*, who made the assignment, the bill was dismissed, by the order of *June 1825*; and *Rogers* was dismissed, not on any ground that he or *Mrs. Lewis* had been improperly made a party to the cause, but on the ground that the creditors had no claim against him or his assignee of the estate.

The answer in *Ramsbottom v. Edwards* states the belief of the Defendants, that the *Ramsbottoms*, who took their assignment from *Hawkins* in *April 1810*, were acquainted with the will of *Popkin*, and were, from time to time, informed of their prospect of obtaining payment out of his estates, and of the proceedings which were carried on for that purpose. Upon the answer, which is the only evidence before me on this occasion, it appears to me very probable that they were informed of the purport of *Popkin's* will and of the proceedings in the cause. There is no pretence of fraud, collusion, or concealment, and even, without supposing that the *Ramsbottoms* actually knew the facts as they occurred, it is plain that by reasonable diligence they might have done so.

Their assignor *Hawkins* was a party Defendant to the cause; the assignment to them was made in 1810, after the institution of the suit; they were creditors by assignment at the date of the decree in 1812; from that time they had an interest in all the proceedings, and  
might

might have inquired and obtained information respecting them; their claim was carried in in 1814, and allowed conditionally in *February* 1815, though not finally allowed till 1824. Upon these facts alone, without referring to others mentioned in the answer, I own that, in the absence of other evidence, I cannot assume that *Messrs. Ramsbottom* were ignorant of the proceedings, or of the foundation of their claim to obtain payment out of the assets of *Popkin*. If they intrusted every thing to the management of the Plaintiff, they must stand in the place of the Plaintiff, and in the absence of fraud, be bound by his knowledge (*a*), and having regard to the statements made in this answer upon the ground of laches, acquiescence, and length of time, I am of opinion, that upon an interlocutory motion, I ought not to give the leave which is asked.

1845.  
GWYNNE  
v.  
EDWARDS.

I give no opinion upon the question as to the relief, if any, which the Plaintiff may be entitled to on the hearing of the cause, notwithstanding the many objections which have been stated to his bill. If, upon the evidence which may be given and upon the argument, it shall appear that he is justly entitled to relief, it may have to be considered, whether that relief can be had, consistently with the proceedings in *Gwynne v. Edwards*, or such of those proceedings as are not now complained of; and though I think it right to refuse this application with costs, I shall give to the Plaintiff leave to renew it at the hearing, if he should be advised to do so. This will prevent his being defeated merely on the grounds that he has not asked for a rehearing.

The cause is abated, and it must, therefore, be understood, that I have expressed my opinion by the desire of both parties.

(*a*) *Hercy v. Dinwoody*, 4 Bro. C. C. 289; 2 Ves. jun. 87.

1845.

July 21.  
Dec. 10.

## TUCK v. RAYMENT.

Exceptions for insufficiency were referred by the Plaintiff to the Master in rotation, instead of to the Master to whom there had been a previous reference. Pending the discussion on the irregularity in the Master's office, the time limited for obtaining the report expired. The Court, considering the error to have arisen from inadvertence, and not from wilfulness or perverseness, gave directions to the Master to hear the exceptions.

THE Defendant, having occasion to apply to the Master for time to answer, obtained the usual certificate of the *Clerk of records and writs*, that the bill had been filed. This certificate was regularly marked, at the public office, with the name of Sir *William Horne* as the Master, but was not returned to the *Clerk of records and writs* (a). Several applications were made for an extension of time to answer, which the Plaintiff's solicitor attended, and he had thereby distinct knowledge that Sir *W. Horne* was the Master to whom the cause had been referred.

On the 15th of *April* 1845, the Defendant filed his answer, and on the 9th of *June* (being the last day but one for that purpose), the Plaintiff filed exceptions (b), and obtained an order from the secretary at the Rolls referring them "to the Master in rotation." He took the order to the public office, and it was there marked with the name of Master *Brougham*. On the 2d of *July*, the parties attended Master *Brougham* on the exceptions, when it was objected, by the Defendant, that Sir *William Horne*, and not Master *Brougham*, was the proper Master, there having been a former reference in the cause (c). The objection prevailed, and the Plaintiff, on the same day, got the order of reference altered in the public office,

(a) See 17th Order of 21st Dec. 1833; *Ord. Can.* 48.

(c) See 15th and 17th Orders of Dec. 1833; *Ord. Can.* 47, 48.

(b) See 4th Order of *April*, 1828, *Ord. Can.* 6. (since repealed.)

office, by substituting the name of Sir *William Horne* for that of Master *Brougham*. A warrant was taken out, and was attended on the 4th of *July* before Sir *William Horne*, when the Defendant objected that the order, as altered on the 2d of *July*, had been obtained after the time allowed, which expired on the 10th of *June*, and, therefore, that the Master could not proceed. The matter stood over, and the objection was on the 11th of *July* allowed.

1845.

TUCK  
v.  
RAYMENT.

¶ 21. Mr. *Addis*, for the Plaintiff, applied that one of the two Masters might proceed to hear the exceptions. He cited *Burrell v. Nicholson (a)*.

Mr. *Greene, contra*.

The MASTER of the ROLLS required a further affidavit to be made by the Plaintiff and his solicitor.

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¶ 10. Mr. *Kindersley* and Mr. *Hubback* on behalf of the Plaintiff, now renewed the motion, on the further affidavits, tending to shew that the error had been accidental, and that the proceeding had not been vexatious.

Mr. *Greene, contra*, contended, that the Plaintiff was entitled to no indulgence; that the Plaintiff, knowing that Sir *William Horne* was the Master to whom the cause had been referred, had carried the matter before another Master, and had wilfully and perversely occasioned the delay, and that time for obtaining the report having elapsed, the answer must be deemed sufficient.

*The*

(a) 6 *Simons*, 212.

1845.  
TUCK  
v.  
RAYMENT.

*The MASTER of the ROLLS.*

I lay out of my consideration the imputations of wilful and perverse conduct on the part of the Plaintiff: that is not shewn.

The certificate obtained by the Defendant, on his application for time to answer, ought to have been returned to the Clerk of records and writs, and though that was not done, there seems to have been no wilful error on the part of the Defendant. The Plaintiff's solicitor attended before the Master on the first occasion, and therefore there can be no doubt that he was well aware that Sir *William Horne* was the Master to whom the cause had been referred.

The Plaintiff being afterwards desirous of having the Master's judgment on his exceptions for insufficiency, (which are not even alleged to be frivolous,) obtained a reference "to the Master in rotation;" this was not the correct form, though it is one very frequently adopted. If the Secretary had been informed, that there had been a previous reference to Sir *William Horne*, the reference would have been directed to him. Again the matter might have been set right in the public office, if the fact of a former reference had been there stated, or the order might have been amended in the Secretary's Office if application had been made before service. This was not done; the consequence was that the reference failed, and this application is made to the Court.

I think there has been no wilful or improper delay. If there had been, or if, as suggested, the party had been guilty of a wilful and perverse design to obtain more time than is allowed by the rules of the Court, I should have thought the matter deserving of a very different consideration.

consideration. Such not having been the case, and the error having arisen inadvertently, I must order Sir *William Horne* to proceed to hear the exceptions.

1845.  
Tuck  
v.  
RAYMENT.

WOOL v. TOWNLEY.

Dec. 20.

THE bill, in this case, had been amended after answer. On the 6th of *November* 1845, the Plaintiff filed exceptions for insufficiency to the Defendant's answer to the "amended bill," and under the General Orders (a) it was necessary to obtain and serve the order of reference within fourteen days, that is, before the 21st of *November*. The Plaintiff, on the 18th of *November*, and within the proper time, obtained, from the Secretary at the Rolls, an order of course referring the exceptions "to the Plaintiff's bill" to the "Master in rotation," and the name of Master Senior was added, in the usual way, in the public office. There had, however, been a previous reference in the cause to Master *Brougham*, and therefore, the reference ought properly to have been directed to him (b). The parties attended Master *Senior* on the 25th of *November*, when the objection being taken, that the reference ought to have been to Master *Brougham*, he declined to proceed.

An order of course for referring exceptions for insufficiency, obtained within the proper limit as to time, but amended after its expiration, discharged for irregularity.

An order of course may be amended before service, but *seem*, that after service it cannot be amended in the absence of the party to be affected thereby.

In discharging an order of course attached to another Court the Master of the Rolls has not authority to direct the costs to be costs in the cause.

On the same day, (the 25th), the Plaintiff got the order of reference of the 18th of *November* amended in the public office, by substituting the name of "Master *Brougham*"

(a) 5th Order, 3d *April*, 1828, Ord. Can. 6., since repealed.

(b) 15th Order, 21st *Dec.* 1833, Ord. Can. 47.



1845.  
  
 Wool  
 v.  
 TOWXLEY.

*Brougham*” for that of “*Master Senior*,” and also by the Secretary at the Rolls, by directing the Master to look into the Plaintiff’s “*amended bill*,” instead of into the Plaintiff’s “*bill*,” and this order, as amended, was served on the same day.

On the 27th of *November*, a warrant to consider the exceptions in Master *Brougham*’s office was attended by counsel for the Plaintiff, and by the solicitor of the Defendant; the latter insisted on the irregularity of the amended order, but the objection being overruled, he then stated, that he did not come to proceed with the argument of the exceptions, and he retired; and the Master, thereupon, allowed the exceptions.

The Defendant afterwards took out a warrant “to review the Master’s decision on the exceptions,” which was attended, and the time was enlarged, to give the Defendant an opportunity of applying to the Court to discharge the order.

Mr. *Toller*, for the Defendant, now moved to discharge the amended order of the 18th of *November*, for irregularity. He argued, that the order of reference ought to have been obtained (5th Order, 3d *April* 1828 (a)), and served (b) within fourteen days from the filing of the exceptions; which period expired on the 20th of *November*, and that the order as amended and served on the 25th of *November* must be considered a new order, obtained after the time allowed, and therefore irregular.

Secondly.

(a) *Ord. Cas. 9.*, since repealed and replaced by the 16th *Order of 5th May, 1845, Art. 23.*  
*2d. Ord. Cas. 284, 285.*

(b) *Attorney-General v. Clark*,  
 1 *Myl. & Cr.* 367.; *Tassier v.*  
*Harrison*, 1 *Myl. & Cr.* 274.

Secondly. That the officer had no authority to alter the order of reference after it had been served, and especially without notice to the party to be affected by the amendment, and that even if the order was to be regarded as an amended and not a new order, it was equally irregular.

1845.  
  
 WOOL  
 v.  
 TOWNLEY.

Mr. *Bilton*, *contra*, contended, first, that the Defendant, by his subsequent conduct and attendance to review the Master's decision, under the amended order, had waived the irregularity; and, secondly, that the amendments were clerical, and not of that important character as to make the proceedings irregular. He cited *Tuck v. Rayment* (a).

Mr. *Toller*, in reply.

*The MASTER of the ROLLS.*

If I were to say, that after an order of course had been delivered out, it could not be altered as to a clerical error, or that the careless marking of the Master's name in the public office might not be corrected, I should be throwing great uncertainty on the practice of the Court. The expression "Master in rotation" may be considered the Master to whom a previous reference has been made (b); but that is not the point now to be considered. If this correction had been made before service, I should not have been the least inclined to disturb it, for I conceive that the officer may alter an order of course before any person is affected by it. After service, it is quite a different question, for then the party comes to meet the order in a particular shape, and he is not to be called on to answer it in a different form, which may raise quite a distinct case.

In

(a) *Ante*, p. 38.      (b) *Attorney-General v. Shore*, 6 *Simons*, 460.

1845.  
Wool  
v.  
TOWNLEY.

In the case of exceptions, the General Orders of the Court provide that they are not to be referred after a certain time, and if a party does not obtain the order on which he relies till after that time has elapsed, he is too late.

With respect to the objection that there has been a waiver, I should say, that if the party, informed of the objection, had thought fit to go on and take his chance of a decision in his favour on the exceptions, he would not, upon his failing, be allowed to raise the objection of irregularity. It is not necessary for me to consider whether the word "amended" was necessary for the validity of the order: the Plaintiff has himself determined the point: he had the order altered, and served it, though too late. I am of opinion that this order is irregular, and I must grant the motion with costs. That does not preclude the Plaintiff from making any application to the Court to be relieved. All I decide is, that, after service, an order of course cannot be amended, and subsequently re-served so as to make the amended order, served after the time, regular.

I do not decide that the officer ought not, in any case, to alter an order of course, without notice to, and in the absence of, the parties to be affected by it.

Mr. *Bilton* asked, that the costs might be costs in the cause.

*The MASTER of the ROLLS.* I have no authority: the cause is not attached to this branch of the Court (a).

(a) 6th Order of 9th May, 1839, *Ord. Can.* 137.

1815.

JODRELL v. JODRELL.

Nov. 10.12.14.

**T**HIS case came on upon a demurrer to the whole bill for want of equity.

The bill was filed by Lady *Jodrell*, by her next friend, against her husband Sir *Richard P. Jodrell*, and against two trustees, named *Slaney* and *King*. The bill represented, that prior to 1836, unhappy differences existed between the Plaintiff and the Defendant her husband, and in consequence, the Plaintiff instituted proceedings in the Ecclesiastical Court for procuring a divorce, on the ground of cruelty. That after the institution of the proceedings, the Defendant made proposals for an arrangement of the differences, with the view of staying the said proceedings; and negotiations were entered into, and an agreement come to, to the effect mentioned in the deed next stated.

That a deed was executed, between Sir *R. P. Jodrell* of the first part, Lady *Jodrell* of the second part, and two trustees, *King* and *Slaney*, of the third part, whereby, after reciting the existence of the suit; that Sir *Richard*

Observations on deeds of arrangement between husband and wife.

A wife having instituted a suit against her husband for a divorce, an arrangement was come to, and the husband executed a deed, by which he assigned a house to trustees, to permit the wife to enjoy it and accommodate herself and children; and an income of 4000*l.* a year was also provided for her separate use to keep up the establishment for herself and children, "upon such a scale

and regulated in such a manner as she should think fit," and the surplus was to be repaid to the husband. The deed provided, that so long as the husband should be desirous to reside in the house "and to conform to the spirit and intention of the deed, and to partake of the benefit of the establishment to be kept up therein by the wife, he should be at liberty so to do." The suit was discontinued, and the husband partook of the establishment. Held, first, that the deed was not void on any ground of public policy; secondly, that, being a family arrangement and a compromise of disputed rights, there was a sufficient consideration; thirdly, that it was not void for uncertainty; fourthly, that the Court could enforce its due performance, both by the wife and the husband, and a demurrer by the husband on those several grounds was therefore over-ruled.

There is annexed to wife's pin money an implied duty of applying it towards her personal dress, decoration, and ornament.

1845.  
JODRELL  
v.  
JODRELL.

was desirous, and had requested that it might be discontinued, "and that certain other proceedings, then in contemplation, for the purpose of obtaining a proper provision for the support of the Plaintiff and her children, might be waived, and that in consideration thereof he had proposed and agreed to demise" the hereditaments to which he was entitled, &c., &c., to *King and Slaney* upon the trusts thereafter mentioned; "IT WAS WITNESSED, that in pursuance of the said agreement, and to prevent further disputes and differences occurring between the said parties, and in consideration of the premises, and for the nominal consideration therein mentioned," Sir *Richard* assigned to the trustees his house in *Portland Place*, and the furniture &c., "upon trust that they should permit and suffer the Plaintiff, during the joint lives of herself and Sir *Richard*, to inhabit, occupy, and enjoy the said messuage," &c., "and to accommodate and provide for her children therein," without paying any rent. And Sir *Richard* thereby demised to the trustees (in general terms), all his freehold manors, hereditaments, &c., for ninety-nine years, upon trust "to pay or cause to be paid to the Plaintiff, or unto such person or persons as she (notwithstanding her coverture) should, from time to time, or at any time or times (after the same should have become due or payable), order or direct, the clear yearly sum of 300*l.*, as and for *pin money* for the Plaintiff, and also the further yearly sum of 3700*l.*, or so much thereof as she should, from time to time, order or require for that purpose, unto the Plaintiff, for her own separate and absolute use, independent of Sir *Richard Jodrell*, and not to be subject to his debts, control, or engagements, such several yearly sums of 300*l.* and 3700*l.* to be paid by even half-yearly payments in every year; and from and after full payment, satisfaction, and discharge of the said expenses, and of the said yearly sums of 300*l.*  
and

and 3700*l.* respectively, upon further trusts to pay the residue or surplus of the said rents &c., unto Sir *Richard Paul Jodrell*.

1845.

JODRELL  
v.  
JODRELL.

And it was thereby declared and agreed, that the Plaintiff should, by and out of the said sum of 3700*l.*, so directed to be paid to her as aforesaid, maintain, keep up, and pay, all the expenses of the household establishment, in or upon the said messuage and premises in *Portland Place*, for the benefit of herself and her said children, which establishment should be *upon such a scale, and regulated in such manner, as the Plaintiff should think fit*, within the limits thereby provided for maintaining the same; and also all expenses which the Plaintiff should incur, during her residence at any watering place; and also all such additional expenses as should be incurred at any seat or country residence of the said Defendant Sir *Richard P. Jodrell*, during any sojourn of the Plaintiff therein; and also all ground rent, assessed and other taxes, necessary repairs, and other outgoings, which should become payable in respect of the said messuage and premises in *Portland Place* aforesaid; and also all wages of servants, and all salaries of masters and governesses for her daughter, and also clothing for her son *Edward*, but no further or other expenses for either of her sons.

And it was thereby further declared and agreed, that if the Plaintiff should not require the whole of the said yearly sum of 3700*l.* for the purposes aforesaid, that *King and Slaney, &c.*, should pay the surplus thereof, if any, or permit the same to be received by the said Defendant Sir *Richard Paul Jodrell*, for his own benefit.

And it was thereby also further declared, that it was the intention of the said indenture and of the parties thereto,

1845.  
JODRELL  
v.  
JODRELL.

thereto, that so long as the said Defendant Sir *Richard Paul Jodrell* should be desirous to reside in the said messuage in *Portland Place*, and to conform to the spirit and intention of the deed of arrangement, and to partake of the benefit of the establishment to be kept up therein by the Plaintiff, he should be at liberty so to do.

The bill then stated, that in consequence, and upon the faith of the said deed of arrangement, and in performance on the Plaintiff's part of the agreement, on which the same was founded, the Plaintiff discontinued the said proceeding so commenced by her in the said Consistory Court, and that, by such discontinuance, such proceedings had been finally terminated, and could not now be revived or renewed by the Plaintiff.

Disputes afterwards arose as to the accounts, and the Defendant Sir *Richard* then disputed the validity of the deed of 1836, and in *August* 1845 discontinued to make any further payments, though (as the bill alleged) "he had ever since that period continued, and still continued, to reside in the said house, and to have the benefit of the said establishment."

The bill prayed that the deed of 1836 might be performed; that the Defendant might be decreed to pay the annual sums of 300*l.* and 3700*l.*, and that he might be restrained from preventing the Plaintiff from inhabiting the house in *Portland Place*, and from interfering with her enjoyment and occupation thereof.

To this bill, the Defendant Sir *Richard P. Jodrell* filed a general demurrer for want of equity, which now came on for argument.

Mr.

Mr. Kindersley, Mr. Romilly, and Mr. Hardy in support of the demurrer.

1845.  
JODRELL  
v.  
JODRELL

The deed, which is the foundation of the present suit, is wholly void on grounds of public policy. By the law of *England*, as well as by the laws of religion and morality, a husband is to be the master of and have the control over his wife, his children, and his property. The object of this deed is to defeat that principle, and to reverse the proper relation between the parties by transferring the rights of the Defendant to the Plaintiff, and by putting himself, his children, his establishment, and his whole fortune under the absolute control and power of his wife. Such an engagement the law will not sanction: it is like that in the case of *St. John v. St. John (a)*, "an engagement under the hand of the husband, that his wife and children shall be free from all control by him, that she shall dwell in his house as long as she pleases, and take herself away when she pleases." It goes further, and, by implication, gives the custody and control of the daughter to the mother, and thus prevents her father's performing the duties and exercising that proper control which the law requires of him. A father cannot be allowed thus to contract away his parental rights and duties. Besides this, the Defendant, by the deed, makes a grant of his whole property to his wife, which Lord *Hardwicke*, in *Beard v. Beard (b)*, held the law would not allow.

By the law of *England* the very existence of the wife is considered as merged in that of the husband. The exceptions which have been introduced have not gone farther than to allow a wife to have property for her separate use, independent of her husband; and, secondly,

to

(a) 11 *Ves.* p. 530.  
VOL. IX.

(b) 3 *Atk.* 72.



1845.

JODRELL  
v.  
JODRELL.

to give her certain rights, through the intervention of trustees, upon an actual separation, but which altogether terminates by a reconciliation. This case falls within neither of these exceptions: it is not a case of separate estate, for the husband, in terms, is to have the joint benefit of it; and it is not a deed of separation, for the deed makes a provision for their living together. It is more like the case of *Hindley v. The Marquis of Westmeath* (a); a deed, in terms a separation deed, but, in reality, not intended to be accompanied by an immediate separation. Such a deed was there held to be clearly void. The intention was, that if the husband did not "conform" himself, as it is termed, his wife should have the power of ejecting him from his own house, and of then living on his fortune, separate from him. This Court "recognises no power in a husband and wife to vary the rights and duties growing out of the marriage contract, or to effect, at their pleasure, a partial dissolution:" *Worrall v. Jacob* (b).

Secondly; there is no sufficient consideration for the deed: it is voluntary, and cannot be enforced in equity. A feme covert cannot execute a deed binding on her. She may renew the proceedings; and there is no covenant, on the part of the trustees, to indemnify the husband against his wife's debts, to which he, therefore, remains liable, notwithstanding this provision: *Hindley v. The Marquis of Westmeath*.

Thirdly; there is no mutuality, for the husband could not compel the proper application of the income: the trustees would have completed their duties when they had paid over the income to the Plaintiff; and however improperly she might apply it, even if she employed it

in

(a) 6 Barn. & Cr. 200.

(b) 3 Mer. p. 268.

in gaining, the Defendant would have no remedy, for it would be absurd for him to file a bill against his wife to recover back the fund misapplied, or to obtain, as against her, an account of the surplus to which, under the provisions of the deed, he is clearly entitled.

1845.  
JODRELL  
v.  
JODRELL.

Lastly ; the terms of the deed are so uncertain that it would be impossible for this Court to carry it into execution : the husband is “ to partake of the benefit of the establishment ” so long as he “ conforms to the spirit and intention of the deed.” What interpretation can be put on words so vague ? Either it is so indefinite as to be unintelligible, or the husband, instead of being master of his establishment, was to become the humble dependant of his wife. Such a deed cannot be supported : it can only lead to endless disputes and misery.

Mr. *Turner* and Mr. *Fréeling*, *contra*, in support of the bill. Neither the provisions of the deed of 1836, nor any statement upon this record, furnish the facts necessary to support the argument which has been addressed to the Court on behalf of the Defendant. They are all assumed. Nothing whatever is stated as to the abandonment of marital or parental control, or duties : nothing is stated as to the relinquishment of the custody of the children, nor of putting the husband and his whole property in the power of his wife. What is alleged is this : — that the wife having good grounds not only for a separation, but a divorce, took proceedings with that object, but, instead of prosecuting it, she, upon the proposal of the husband, assented to an arrangement, the avowed object of which was to prevent both a present or prospective separation. By the terms of that arrangement an establishment and a separate income were provided for her and her family, not to the exclusion of the husband, for he was

1845.  
  
 JODRELL  
 v.  
 JODRELL.

to have a qualified enjoyment of it. What can there be illegal in this? The Court sanctions arrangements between husband and wife, by which (by his assent) a part of his property may be held independent of him, as in *Slanning v. Style* (a), *Culmady v. Culmady* (b). A man may, by arrangement, irrevocably qualify his enjoyment of his own property; *Petre v. Espinasse* (c); and the Court will not relieve him therefrom. If the wife may have property totally distinct from her husband, why may she not have it in a qualified degree? Even if there had been stipulations as to the care and custody of the children, that would not have affected the validity of the deed, for the Court has repeatedly sanctioned such arrangements for the benefit of infants: *Lyons v. Blenkin* (d); *Colston v. Morris* (e); *Fagnani v. Selwyn* (g); *Hill v. Gomme* (h).

As to the want of consideration and alleged voluntary nature of the deed, the abandonment of the ecclesiastical suit, which cannot now be resumed, forms a sufficient consideration, and has so been considered; *Bateman v. The Countess of Ross* (i); *Wilson v. Wilson* (k). The Courts have frequently supported even deeds of separation: *Hobbs v. Hull* (l); *Fitzer v. Fitzer* (m); *Nunn v. Wilsmore* (n); *Clough v. Lambert* (o); *Elworthy v. Bird* (p); and a covenant on the part of trustees to indemnify the husband is unnecessary; *Rose v. Willoughby* (q); *Westmeath v. Westmeath* (r); *Wilson v. Wilson*;

(a) 3 P. Wms. 334., and 2 Eq. Ca. Ab. 156.  
 (b) Cited 2 Eq. Ca. Ab. 156.  
 (c) 2 Myl. & K. 496.  
 (d) Jacob, 245.  
 (e) *Ib.* 257. note.  
 (g) *Ib.* 268. n.  
 (h) 1 Beavan, 540.  
 (i) 1 Dow, 235.

(k) V. C. E. Feb. 11. 1845.  
 (l) 1 Cox, 445.  
 (m) 2 Atk. 511.  
 (n) 8 Term Rep. 521.  
 (o) 10 Sim. 174.  
 (p) 2 S. & St. 372.  
 (q) 10 Price, 2.  
 (r) Jacob, 126.

*Wilson (a)*; *Frampton v. Frampton (b)*. Again this is not the case of an executory trust, but a trust executed.

1845.  
JODRELL  
v.  
JODRELL.

As to mutuality, the Court has ample power to prevent a misapplication of the income provided for the Plaintiff. Her separate estate is liable; *Murray v. Barlee (c)*; and the Court might lay hold of the fund, affected as it is with a trust as to its application, while in the hands of the trustees, and then enforce its proper application.

The terms of the deed are sufficiently certain to act upon, and the trustees refusing to act, a bill may be supported by the wife by her next friend, as was the case in *Cooke v. Wiggins (d)*. They also cited *Seagrave v. Seagrave (e)*.

Mr. *Kindersley*, in reply.

*The MASTER of the ROLLS.* All deeds of arrangement entered into for the purpose of altering, in any material degree, the relation which the law establishes between husband and wife, are attended with very great difficulty. They usually originate under circumstances of a distressing and serious nature, and they tend to sanction innovation on that relation from which both parties hoped to find the greatest degree of comfort and happiness. On those subjects, however, it is not my intention to add any further observations to those already made by other judges in language such as to command the general feeling of all mankind on the subject.

When,

(a) *V. C. E. Feb. 11. 1845.*

(d) 10 *Vesey*, 191.

(b) 4 *Beavan*, 287.

(e) 13 *Ves.* 439.

(c) 3 *Myl. & K.* 209.

1845.  
  
 JODRELL  
 v.  
 JODRELL.

When, however, observations are made as to the mischief which regulations such as these may produce, it must always be borne in mind, that no such arrangements are ever thought of or contemplated, until the differences and dissensions between the parties have proceeded to such length, and have produced such a degree of unhappiness, that nothing which can be produced from such arrangements can probably add to it.

In this case, the parties seem to have married about the year 1814; and, more than twenty years after the marriage, we find a suit instituted in the Ecclesiastical Court, by the wife against the husband, for a divorce or separation on the ground of cruelty. In the course of the argument, both sides have very properly abstained from making any allegation of fact as to the cause of that proceeding. I know nothing of it, further than that it is alleged and admitted for the purpose only of this demurrer. However, the bill alleges, that there was a suit for the purpose of obtaining a divorce on the ground of cruelty, and that Sir *Richard Jodrell*, with a view of preventing publicity, and trying to live in harmony again, and to prevent disputes, made a proposal for an arrangement, which ended in this deed, and thereupon the proceedings in the Ecclesiastical Court were discontinued. The arrangement entered into was this; that the wife was to have the means of maintaining an establishment, by an income which was made independent of Sir *Richard Jodrell*. The income was 4000*l.*, of which 300*l.* is called pin money, and the remaining 3700*l.* was to be applied in a particular manner. Both those sums were subject to a duty as to their application; the 300*l.* was not, as I think it was pretended to be, a sum which the wife might do what she pleased with, but there was annexed to the possession

sion of that pin money the duty of applying it for her own personal dress, decoration and ornament (*a*). She had it to spend in such a manner as she separately thought fit, but for certain purposes in the performance of which her husband as well as herself had an interest. Again, with regard to the remaining 3700*l.*, although she was to have it for her separate use, as is distinctly stated, yet it was not given to her in such a manner that she might freely dispose of it in any way she might think fit, for the deed annexed to it the duty of applying so much as she should think fit in a particular manner, leaving the remainder for her husband.

1845.  
JODRELL  
v.  
JODRELL.

I do not think, even with regard to the pin-money, that the performance of a duty cannot be annexed to a woman's separate estate. To be sure, if those duties cannot be performed by her without infringing on maxims and rules of law, then there would be good ground to object to it; not, indeed, because the husband has thought fit to add the performance of duties to the separate estate, but because the duties are such that they cannot be performed without infringing on the rules of law.

The expression "the spirit and intention of the deed" appears, therefore, to me to be this: — that under the peculiar circumstances in which these parties were placed, she was to be provided with an income, by means of which she might maintain a comfortable establishment for herself and her children, and of which her husband was enabled to partake.

In the discussion of the particular provisions of this deed, it has been ably and eloquently stated, how many causes

(*a*) *Howard v. Digby*, 2 *Clark & Fin.* 634.

1845.  
JODRELL  
v.  
JODRELL.

causes of difference may arise out of it. I think I may accede almost to the whole argument in that respect. But just apply those arguments to the ordinary relation of husband and wife, unaffected by such a deed. Is it possible, without mutual kindness, confidence, and forbearance, without constantly avoiding causes of irritation, that a husband and wife can avoid those perpetual differences which it is supposed must arise from the provisions of such a deed as this? All the arrangements which are or can be made as between husband and wife living together, must be, in a great measure, dependant for their due performance on those mutual observances and forbearances, without which no two persons can live together in peace and harmony. If, indeed, either party or both parties be determined to create an obstruction and maintain a separate will on every occasion; if they be determined never to yield or agree, so that nothing can be done without dissension, then, undoubtedly, no such a deed as this will enable them to live in harmony together. On the other hand, if they are affected, as they ought to be, by a mutual desire to accommodate the small differences which almost necessarily arise when persons are living entirely together, I do not know that there would be any very great difficulty in acting on such a deed as this.

What, in fact, does it come to? separation? No: the parties to the deed say, we do not mean separation at all. It is plainly avowed that they mean to avoid separation. She alleges that she had a cause not of separation only, but of divorce; he proposes an arrangement, by which there shall not only not be divorce, but no separation; and this agreement is the consequence.

Now

Now examine in detail the provisions of this deed. First, it provides 300*l.* a-year pin money. That, by itself, can scarcely be objected to, but it is said that it must fall with the rest, though standing by itself it is unobjectionable. Then there is an assignment and conveyance to trustees, amongst other property, of a house in *Portland Place*, which the Plaintiff is to be permitted to inhabit, occupy, and to enjoy, and to accommodate and provide for her children therein, without paying any rent or other remuneration for the same, &c. To enable her to do this, an income must be provided, and accordingly 3700*l.* a-year was to be placed in the hands or names of the trustees, and she was to draw for so much of it as she should, from time to time, require for that purpose; and if she did not take the whole, the remainder was to be for Sir *Richard Jodrell*. What was she to do with this income? She was to "maintain, keep up, and pay all the expenses of the household establishment, &c., for the benefit of herself and her children." Then comes the clause which is so much complained of,—“On such a scale, and regulated in such a manner as she shall think fit, within the limits thereby provided.” So that she, by these means, had given to her the power of determining what was to be the scale and what was to be the regulation on which the establishment was to be kept up. She was to pay all expenses which she should incur at any watering place, and all additional expenses incurred at any country residence of Sir *Richard*, during any sojourn of her's there. Here, again, it may be remarked, that not only was there to be no separation as to the house in town, but if she went to one of her husband's country residences, (from which it may be inferred that she was to be at liberty to do so), she was to bear so much of the additional expenses as her going occasioned. She was also to pay the ground-rent of the *Portland Place* house,

1845.

JODRELL  
v.  
JODRELL.



1845.  
  
 JODRELL  
 v.  
 JODRELL.

house, and "all wages of servants and salaries of masters, and governesses for her daughter, and also clothing for her son *Edward*," and the surplus was to belong to Sir *Richard*. Now all these were purposes in which Sir *Richard* was himself interested: they were duties which she had to perform towards him, as well as towards herself and to her children.

The last clause is that which has been most commented on, by which Sir *Richard* is to be at liberty to partake of the benefit of the establishment, "so long as he should be desirous to reside at *Portland Place*, and conform to the spirit and intention of the deed of arrangement." Now, the arrangement being made in a case where man and wife had differed, the alleged ground of difference being cruelty entitling the wife to a divorce, the spirit and intention of the arrangement, as far as I can collect from the deed, is no more than this: that she was to have from him an income for the purpose of keeping up this establishment for the benefit of herself and her children, which the husband was enabled to partake of.

It has been said, that an arrangement of this sort greatly alters the ordinary relation between husband and wife. No doubt it does; but if it is said that it entirely destroys the ordinary duties, as they before existed, between husband and wife, I think that that proposition cannot be maintained. What personal relation is directly affected by this? If, indeed, the parties do not endeavour to accommodate themselves to this state of things; if they seek every occasion, from time to time, of jarring, and are determined not to agree together, then it furnishes, no doubt, foundation enough of difference, and, unfortunately, of great misery to both; but it is equally true, that they might, notwithstanding a provision in the deed, go on harmoniously, without

without any dispute, and in perfect conformity with all the ordinary duties between husband and wife. If, however, they are determined to quarrel about these things, if instead of maintaining good temper, and shewing a mutual forbearance, they seek every occasion for irritation and quarrel, then, no doubt, the means of disagreement will be found in this arrangement; as, unfortunately, they are but too frequently found in the ordinary relation of man and wife. I feel, therefore, very considerable difficulty in coming to the conclusion that this arrangement is illegal, or contrary to the policy of the law, or that it places the husband altogether in the power of the wife against the law.

1845.  
JODRELL  
v.  
JODRELL.

With regard to the argument as to the dependence of the husband on the wife, it is to be observed, that by the settled and ordinary law of this Court, a woman may have property settled on her to be enjoyed for her separate use; the meaning of which is no more than this, that she has it independently of her husband. It has relation to the marital power, and she has it independently of her husband. It makes no difference whether the husband has the means of supporting himself or not. He may, from day to day, be dependent for his maintenance and support on her will, or, as it is said, on her caprice; and the experience of this Court shews, that notwithstanding the power which she may have over the property, it is the wife who requires protection, and that unless her separate estate is accompanied with a fetter against anticipation, the husband is apt to obtain the whole control of it, and frequently prevails on her to part with it altogether. Lord *Thurlow* first imposed this fetter, depriving her of the power of disposing of the estate by anticipation, and he thus afforded a married woman the only real protection she has against the influence of her husband. I do not, therefore,

1845-  
  
 JODRELL  
 v.  
 JODRELL.

therefore, think that this argument is to be so much relied on. If there had been proper behaviour on both sides, these provisions might not have led to any dispute at all between them. I will not refer to misconduct : it is not in the least material, in the view which I have taken of this case, thinking, as I do, that the provisions of the deed are not illegal, although, in consequence of the conduct of the parties, they may, perhaps, prove very inconvenient, and may, perhaps, afford the means rather of exasperating quarrels, which might, nevertheless, have equally arisen, if the parties had stood in the ordinary relation of husband and wife.

The next objection which is made to this is, that it takes away that control which the father ought to have over his children. This argument is very much the same as the former. Nothing is said about the control of the children in the deed. A duty is annexed to the separate estate given to the wife : she has to provide for them in the house, to pay the salaries of masters and governesses for her daughter, and to provide clothes for one of her sons. But what is there illegal in this ? It may or not be a very imprudent thing to do so, and the parties may have differences relating to these matters ; but I do not see any circumstance which makes this matter illegal. Such a state of independence on the part of a wife may be inconvenient, but not more so than it is for any married woman to have a large separate estate while her husband has nothing.

With regard to the other points, — namely, want of consideration and the want of mutuality, — I do not think that they ought to influence the mind of the Court at all. This is not a matter of pecuniary consideration, but a family arrangement, a compromise of litigated rights between the parties.

The

The dispute between them seems to have taken place more than twenty years after they had been married. That length of acquaintance with each other might certainly enable Lady *Jodrell* to know, well enough, what species of protection her particular circumstances required; and might, at the same time, have enabled Sir *Richard Jodrell* to know, whether his wife was a person who could, in prudence, be entrusted with the performance of the duties which he committed to her. With this mutual knowledge of one another, and for the purpose, as they state in the deed, of preventing further disputes, — with a provision made for living together, which would, in the case of married people, imply cohabitation, with no one provision depriving either party of any right to the performance of any conjugal duty, and with nothing to shew that any breach of conjugal duty will arise, otherwise than by a remote inference, and that not necessarily arising from the provisions of the deed, — it is said, that this deed is illegal; and one of the grounds stated is, that there is a want of mutuality and a want of remedy.

1845.  
JODRELL  
v.  
JODRELL.

It is not necessary to go into that at any length, for if it is once ascertained that the Plaintiff has a duty which she has neglected to perform, then, whatever difficulty there may be in regard to form, I am quite satisfied, that the Court will take care not to allow her to retain the means of continuing to commit the like breaches of duty. It certainly seems to be absurd enough for a husband to file a bill against his wife to compel the repayment of the money: that is admitted; but it is said, that if there was any right in regard to past misappropriation, it would be made good against her pin money. I think that this argument must have fallen accidentally, because the pin money has also duties annexed to it, which would remain unperformed,  
if

1845.  
JODRELL  
v.  
JODRELL.

if any remedy were had against it, and the husband would be liable for all the expenses, which would be occasioned by the non-performance of the duties attached to the pin money. But I cannot doubt that the Court would reach the monies in the hands of the trustees, if the Plaintiff, by her conduct, shewed that she was not fit to be entrusted with the performance of the duty here entrusted to her. I think the Court would take care that she had not the means of committing any further breach: but that really is not a question which can now be properly decided or considered.

Looking at the whole of this case, it appears to me that this is not a deed which I can, on this demurrer, consider as an illegal deed.

The demurrer must, therefore, be overruled.

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NOTE. — An appeal was contemplated, but the Defendant ultimately submitted.

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1845.

HOTHAM v. SOMERVILLE.

July 24, 25.

**I**N 1844, a freehold estate belonging to Mr. *Beaumont Hotham* was sold under an order of the Court to Mr. *Latham*. The purchase money, amounting to 9000 guineas, had been paid into Court, and it was thereupon referred to the Master to settle the conveyance, in which all proper parties were directed to join.

In the course of prosecuting that order, it appeared, that memoranda of two judgments which had previously been obtained against Mr. *Hotham*, by means of warrants of attorney, had been duly entered with the Master of the Common Pleas, under the provisions of the 1 & 2 Vict. c. 110. (a) But in the warrants of attorney and judgments, and in the proceedings relative thereto, Mr. *Hotham* had been named *William Hotham* instead of *William Beaumont Hotham*.

Subsequent to the judgments and their entry, and in October 1843, a vesting order under the Insolvent Debtors' Act had been made against Mr. *Hotham*, and in April, 1844, he took the benefit of the Insolvent Act, and was discharged.

Under these circumstances, the Master, being satisfied by affidavit that *William Hotham* and *William Beaumont Hotham* were one and the same person, was of opinion, that the judgment creditors were necessary parties to the conveyance. He made them parties accordingly, they being willing to execute, provision being made for payment

A judgment was entered up &c. against Mr. *H.* under a warrant of attorney. In the judgment, warrant of attorney, &c., he was named *W. H.*, his proper name being *W. B. H.* Held, that the judgment was valid.

A judgment was obtained against a party under a warrant of attorney. He afterwards took the benefit of the Insolvent Debtors' Act. Held, that the judgment creditor was a necessary party to the conveyance of the insolvent's real estate to a purchaser, notwithstanding the 1 & 2 Vict. c. 110. s. 61.

(a) Sect. 19.

1845.

HOTHAM

v.

SOMERVILLE.

payment of their debts out of the surplus of the purchase money, after satisfying the prior charges.

A petition was now presented by the Plaintiff in the second cause, praying that the judgment creditors might effectually discharge the property from their claims, and that the residue of the fund in Court, after payment of all prior charges, might be applied in payment of the judgment creditors.

Mr. *Turner* and Mr. *Glasse* in support of the petition.

Mr. *Follett* for the assignee under the insolvency. The judgment creditors are not necessary parties to the conveyance; first, because the proceedings and judgments, being in the name of *William Hotham*, are insufficient to charge the estates of *William Beaumont Hotham*; and, secondly, because the object of the Insolvent Debtors' Act being to place all creditors, as far as possible, upon an equality, it is enacted, by the 61st section, that, after the estate of an insolvent debtor is vested in the provisional assignee, no creditor, who has obtained a judgment by virtue of a warrant of attorney, shall avail himself of any execution issued upon such judgment, "either by seizure or sale of the property of such prisoner, or any part thereof, or by sale of such property;" but shall be a creditor under the act. The Master was of opinion that the clause applied to personal estate only; but such is not the case; the expression is "property," and applies to all property which a judgment creditor might sell for payment, and, therefore, to real estate, which might be sold under the equitable charge created by the 13th section of the act.

Mr. *G. L. Russell*, for the purchaser, and Mr. *F. T. White* for the two judgment creditors.

The

The judgment creditors are necessary parties. The identity being proved, no objection arises from the omission of the name "*Beaumont*." In *Reeves v. Slater* (a) *A. B.* executed a warrant of attorney in the name of *C. B.*, and judgment was entered up and a *fi. fa.* issued against him by that name: it was held, that this was right, and that the sheriff was bound to execute it. So here, the party was estopped from disputing the accuracy of the description, and his assignees are equally bound.

1845.  
HOTHAM  
v.  
SOMERVILLE.

Secondly; the 61st section applies only to personal estate, which the creditor can make available by *seizure and sale*. The judgment creditors could not, by virtue of their equitable charge under the 13th section, seize and sell: that must be done by a court of equity: besides, they have a general lien on the estate quite independent of the 1 & 2 *Vict. c. 110.* (b)

Mr. *Borton* for prior incumbrancers.

The MASTER of the ROLLS, on the first point, said, that if a party thought right to adopt a name he must bear the consequences; and as to the second, he was of opinion that the Master had come to a right conclusion, and that the judgment creditors were necessary parties.

(a) 7 *Barn. & Cr.* 486.

(b) 13 *Ed. 1. c.* 18.



1845.

July 22. 31.  
Aug. 2.

## ROCKE v. ROCKE.

An absolute vested bequest was accompanied with a direction, that it should not be delivered till the legatee attained twenty-five. Held, that he was entitled to payment on attaining twenty-one.

**T**HE testator, by his will, expressed himself as follows:—“I appoint my son *Richard Hill* and his heirs my residuary legatee, to have and to hold the residue of my property of every sort and kind, after the several above stated bequests have been paid; but it is my especial desire that the residue of my property be not delivered over to him *until the completion of his twenty-fifth year*, and that, in the mean while, he be subject to the guardianship of his mother.”

*Richard Hill*, the son, attained his age of twenty-one years on the 7th of *June* 1845, and the residue being in Court, he now presented a petition for payment.

Mr. *Heathfield* in support of the petition. The gift being vested, is payable upon the petitioner attaining his majority, and notwithstanding the direction in the will, he is not bound to wait until he attains twenty-five before he receives it.

*The MASTER of the ROLLS.*

I will look at the terms of the will, and see if the order can be made. If I should be satisfied that there is an absolute gift, with a direction to pay at twenty-five, then, as he has an absolute right at twenty-one, and can sell and mortgage his interest, I shall order payment.

Aug. 2.

*The MASTER of the ROLLS* made the order for the immediate payment of the residue to the petitioner.

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NOTE.—See *Scamlers v. Frazier*, 4 *Beavan*, 115., and 1 *Phil.* 240. *Jessie v. Jessie*, 9 *Sm.* 63.. *Jackson v. Merchants*, 12 *Simons*, 93.. *Curtis v. Lucia*, 5 *Beavan*, p. 155.

1845.

The ATTORNEY-GENERAL v. The Corporation of PLYMOUTH. June 2. 4. 9.  
Nov. 5.

THE object of this information was to set aside a purchase made in 1805, by the corporation of *Plymouth*, from a charity called the *Hospital of Orphans Aid*, and for a declaration of the extent of the rights of the charity consequent on such relief. The circumstances which gave rise to the suit were as follows : —

By the statute of the 27 *Eliz. c. 20.* (after reciting the advantage which would accrue to the shipping of her Majesty and her subjects, and to the town, from having a supply of fresh water at *Plymouth*, and that the haven was filling up with sand, and would be utterly decayed, unless some speedy remedy were at hand, and further reciting that there was a river called *Mewe*, about eight or ten miles distant, which might be brought into the town of *Plymouth* without any great damage, by reason that the land through which the same should be conveyed was barren, &c.; and that “ by bringing of which

The statute of the 27 *Eliz. c. 20.* authorized the corporation of *Plymouth* to construct a watercourse or conduit, for bringing a supply of fresh water from a distance to *Plymouth* for public objects, as for the supply of the ships and town and to scour the haven. Mills were erected on the watercourse, and the corporation afterwards conveyed away a portion of their interest in the leat : —

Held, that the corporation had undertaken the performance of a public trust, and could not divest themselves of the means of fully executing it; that the primary duty of the corporation was to provide for the public objects contemplated by the act; and that the surplus water only, after satisfying the public purposes, could be applied to the use of the mills. The Court also considered it to be doubtful, whether the corporation could alienate the watercourse, or any part, for satisfying their own debt.

Upon the construction of the particular instruments, held, that, by the conveyance of one-fourth “ of and in the leat or watercourse,” the purchaser acquired no interest in the water, other than such part as remained after supplying the public purposes for which the leat was authorized to be made.

A hospital having a corporate character was established in close connexion with a municipal corporation. The ex-mayor was to be the governor, the masters and assistants were elected from the corporation, and the mayor and aldermen were visitors : — Held; that the corporation and hospital were, in equity, incapable of contracting, and a purchase by the corporation of property belonging to the hospital was set aside.

1845.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 The Corpor-  
 ation of  
 PLYMOUTH.

which water most of the incommo-  
 dities and damages and divers others  
 would not only be remedied, but also  
 some part of the channel of the said  
 haven scoured and cleansed by the  
 same river, to the perpetual contin-  
 uance of the same haven, a matter  
 most beneficial to the realme"),  
 the corporation were empowered to  
 dig and mine a ditch or trench, in  
 breadth between six and seven feet  
 through the lands between the town  
 of *Plymouth* and the river *Mew*, for  
 conveying the river to the town,  
 making compensation to the owners.

The "watercourse or leat," having  
 been formed, was, with certain  
 mills, &c., on the 10th of *August*  
 1593, leased by the corporation to  
 Sir *Francis Drake* for sixty-seven  
 years.

In 1617 (under the powers contained  
 in the 39 *Eliz.* (a)) certain premises  
 were erected into a hospital, to be  
 called "The Hospital of Orphans Aid"  
 in *Plymouth*, for the relief of certain  
 poor people, and the hospital was to  
 consist of a governor, four assistants,  
 two wardens, and forty poor people  
 to be relieved, and they were, under  
 the powers of the act, erected into  
 a corporation.

By the foundation deed, the last  
 mayor of *Plymouth* for the time  
 being was to be the governor. The  
 mayor of *Plymouth* for the time  
 being and his brethren were thereby  
 nominated to have the ordering,  
 directing, and visiting the said  
 hospital, and the placing, and, upon  
 just cause, displacing, of the said  
 orphans; and the mayor, his  
 brethren, and the common council  
 were to make, alter and explain the  
 orders, &c.; and by the ordinances,  
 the two wardens were to be elected  
 by the mayor

(a) Chapter V. made perpetual by the 21 *Jac.* 1. c. 1.

mayor and aldermen. In practice, the four assistants were chosen from among the magistrates or aldermen of the corporation.

1845.  
The  
ATTORNEY-  
GENERAL  
The Corpor-  
ation of  
PLYMOUTH.

In 1628, *Drake*, in consideration of 1500*l.*, assigned a moiety of the leasehold interest to trustees for the hospital.

On the 3d of *October* 1653, the corporation of *Plymouth* agreed, in consideration of 1400*l.* owing by them to the hospital, to sell to the latter one fourth of the mills and of the land let to Sir *F. Drake*. These were in the same year conveyed to *Gubbs* and *Francis*, by indenture of the 6th of *October* 1653, and were by them conveyed to the hospital by indentures of the 10th of *May* 1655.

The whole property continued under the management of the corporation of *Plymouth*, who accounted to the hospital for what was considered to be its share of the income of the property. In 1805, a committee appointed by the corporation recommended the corporation to repurchase the one fourth of the property from the hospital.

Accordingly, by indenture dated the 22nd of *June* 1805, made between the hospital and the corporation, after reciting that from changes, &c., the property comprised in the indentures of 1653 and 1655, and the share of the hospital, could not be ascertained with any degree of certainty, the hospital, in consideration of 1800*l.*, re-conveyed the property comprised in the indentures of 1653 and 1655 to the corporation.

The corporation received considerable sums from the water rates paid by the inhabitants for a supply of water from the "leat," and also for a supply of water to some government

1845.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 The Corpor-  
 ation of  
 PLYMOUTH.

government departments under the 5 G. 4. c. 49., but they had made very considerable outlays in respect of the waterworks, &c.

Two questions were raised on this information. First, it was insisted that the repurchase made in 1805 was invalid, being made from the corporation, who stood in a fiduciary relation towards the hospital, or was so closely connected therewith as to make a purchase from the latter invalid. That there was no reason for making the sale, and that the consideration was insufficient.

Secondly; it was contended that the hospital was entitled to one fourth of the "leat," and to one fourth of the whole income derived from the water, including the water rates, and the produce of mills erected subsequent to the grant; but the Defendants, the corporation, contended that the hospital was entitled only to one fourth of the property of the waste water of the leat after supplying the town, and to one fourth of certain mills only.

The second point was made to rest on the terms of the several documents; but it is unnecessary to set forth the terms of those documents, especially as they will be found sufficiently stated in the judgment.

Mr. TUCKER, Mr. THORNTON, and Mr. BIRN, in support of the information.

Mr. KINGSLAND for the hospital.

Mr. KINGSLEY and Mr. CHAMBERS for the corporation of Plymouth.

The

The case of *The Attorney-General v. Brettingham* (a) was referred to.

1845.

The  
ATTORNEY-  
GENERAL  
v.  
The Corpor-  
ation of  
PLYMOUTH.

The MASTER of the ROLLS postponed giving judgment.

*The MASTER of the ROLLS.*

The information in this case prays, that it may be declared that a conveyance dated the 22nd day of *June 1805* is void, and ought to be delivered up and cancelled; and that the *Hospital of Orphans Aid*, in the information mentioned, may be declared to be entitled to one fourth part of the premises comprised in certain indentures of the 6th day of *October 1653*, and the 10th day of *May 1655*, and that, notwithstanding the conveyance of the 22nd of *June 1805*, the hospital is entitled to a full one fourth part of the whole rents and profits of the said premises, and of the "leat" mentioned in the indentures of 1653 and 1655, and of certain fines and consideration monies in the information mentioned. The information also prays for the relief alleged to be consequent on such declarations.

The ostensible object of the information is, to set aside an alienation which was made of property belonging to the hospital in the year 1805, and if that should succeed, to obtain a declaration that the hospital is entitled to an equal fourth part of the *Plymouth* leat, and of the profits arising from the supply of water, by means of the leat, to the town of *Plymouth*, and the ships in the harbour there.

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(a) 3 *Beav.* 91.

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1845.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 The Corpor-  
 ation of  
 PLYMOUTH.

The alienation in 1805 was made by the corporation of the hospital to the corporation of *Plymouth*; and it is alleged, that the corporations and the persons by whom their transactions were conducted, stood towards each other in such a relation, that a conveyance from one to the other cannot be sustained in this Court, especially in a case like the present, in which it is alleged that there was no good reason to justify the alienation, and also that the consideration given to the hospital was inadequate.

The right to the leat, and to the profit of the water supplied by means of it, only comes in question upon this information, in the event of its being declared that the alienation of 1805 ought to be set aside. It is made to depend on the construction of several instruments relating to several acts of persons entitled, or supposed to be entitled, to various interests in the leat.

The *Plymouth* leat was constructed under the authority of an act of parliament passed in the year 1584 (27 *Eliz. c. 20.*). The objects of the act were entirely public, to supply the ships in the harbour of *Plymouth*, and the town of *Plymouth* itself with water, and to scour some part of the channel of the haven, by means of the leat which was intended to be formed for the purpose of bringing the water from the river *Mea* to the harbour. The power of purchasing the land required, and making the requisite construction, was given to the corporation of *Plymouth*.

It seems, that after the construction of the leat, and on the 10th of *August* 1598 (35 *Eliz.*), the corporation of *Plymouth* granted to Sir *Francis Drake* a lease for sixty-seven years from the ensuing *Michaelmas*, of various houses, closes of land and certain mills, and of the

the leat or watercourse then coming and going to the aforesaid mills; but the terms of the lease are only known by the imperfect recital of them in a deed of long subsequent date. The lease is said to have been granted under the yearly rent of 34*l.* 3*s.* 4*d.*, and divers covenants, conditions, and reservations.

1845.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 The Corpor-  
 ation of  
 PLYMOUTH.

The *Hospital of Orphans Aid* was founded in 1617 (17th *July*, 15 *Jac.*), under the powers given by the act of the 39 *Eliz.* and was endowed with certain property, and made to consist of one governor, four assistants, two wardens, and from three to forty poor people, as the fund would bear. The land with which the hospital was endowed was given, in pursuance of a trust, by *Thomas Sherwill* and *Nicholas Sherwill*, to whom it had been conveyed by the corporation in the year 1615, and a very close connexion was established between the hospital and the corporation. The person who had been mayor of the town last before the present mayor was, in all time, to be governor of the hospital. I do not find in the foundation any special regulation as to the mode in which the assistants and wardens were to be appointed; but it seems that, in the usual practice, the four assistants were chosen by the mayor from amongst the magistrates or aldermen of the corporation of the town; and that the two wardens were chosen biennially out of the twenty-four councilmen of the corporation of the town, and the poor were to be persons born within the borough.

In the year 1628, it seems, that the hospital became entitled to a considerable sum of money, under the will of *Rawlins*, of which *Walter Hele*, *Thomas Sherwill*, and *Matthew Nicholls* were executors, and, by an indenture dated the 10th of *September* 1628, and made between Sir *Francis Drake*, Bart. (who was recited to have



1845.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 The Corpor-  
 ation of  
 PLYMOUTH.

have become entitled for divers years to come to the premises comprised in the lease granted to Sir *Francis Drake*, Knight, in *August 1593*), of the one part, and *Hele*, *Sherwill*, and *Nicholls*, the executors of *Rawlins*, of the other part, it was witnessed, that *Drake*, in consideration of 1500*l.* to him paid by the executors, assigned and set over to them the moiety and halfendale of the premises comprised in the lease, including the moiety of the leat and watercourse then coming and going to the mills; to hold to the executors, for the residue of the term of sixty-seven years, paying a moiety of the rent, and performing the other covenants and conditions.

Whatever was the interest thus assigned to *Hele* and the others, it was to determine with the term of sixty-seven years, at *Michaelmas 1660*. The reversion remained in the corporation of *Plymouth*; but, on the 3rd of *October 1653*, the corporation of *Plymouth* ordered, that for the consideration of 1400*l.*, part of a greater sum due from the corporation of the town to the hospital, an estate in fee-simple should be granted, to or in trust for the hospital, of one fourth part of all the mills, toll, and mulcture, leat and watercourse, and of the several closes, theretofore granted to Sir *Francis Drake*, and leased for several years then to come and unexpired.

By an indenture dated the 6th of *October 1653*, the corporation of *Plymouth* conveyed to *Gubbs* and *Francis*, who, by an indenture dated the 10th of *May 1655*, conveyed to the *Hospital of Orphans Aid*, all the messuages, lands, tenements, mills, and closes of land, with the appurtenances, thereafter mentioned, that is to say, the one fourth part, in four parts to be divided, of and in all and singular the messuages, lands, tenements, meadows,

meadows, mills, and closes of land, with the appurtenances, in the said indenture after mentioned. The description of the premises, after mentioning certain closes of land, houses, and mills, and particularly a malt mill, and two grist mills, and the tucking mill, in the close called the malt mill close, within the said borough, adds these words, viz., "together with the fourth part of and in the said close, and the *leat or watercourse* running, coming, and going to all the said mills."

1845.  
The  
ATTORNEY-  
GENERAL  
v.  
The Corpor-  
ation of  
PLYMOUTH.

It is to be observed, that the transaction, completed by the two last-mentioned indentures, appears to be a transaction between the corporation of *Plymouth* and the *Hospital of Orphans Aid*, in which the corporation took upon themselves to satisfy a portion of the debt, admitted to be due from them, by means of this conveyance. In the character of the persons by whom it was conducted, it does not appear to differ from the transaction of 1805, which is complained of in this information. It is, nevertheless, the transaction of which the information claims the benefit for the hospital.

It is insisted, that by the words, "together with the fourth part of and in the said close, and in the *leat or watercourse* running, coming, and going to all the said mills," the hospital became entitled to one fourth part of the leat or watercourse running from the river *Mew* or *Meye* to the harbour of *Plymouth*.

It may reasonably be doubted, whether the corporation, having been empowered to make, and being in possession of the leat or watercourse for the special purposes mentioned in the act, could alienate any part of it, for the purpose of satisfying their own debt. They must, I think, be considered to have undertaken the performance

1845.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 The Corpor-  
 ation of  
 PLYMOUTH.

performance of a public trust and duty, and could not lawfully divest themselves of the means, or any part of the means, of fully performing that duty or executing that trust.

But, however this may be, and whether the corporation were or were not competent to conduct such a transaction between themselves and the hospital, I am of opinion, that the primary duty of the corporation, under the act of *Elizabeth*, was and is, to provide for the public objects contemplated by the act, and that it would be contrary to their duty, to permit the interests of any persons interested in the mills, or in the application of the water brought by the leat to the purposes of the mills, to have any competition with the public interests intended to be secured by the act. I think that the corporation of *Plymouth* never had, and have not now, any right to apply or permit to be applied to or for the use of the mills any water brought by the leat, other than that which may remain after the public purposes intended by the act were fully satisfied.

I do not wish to suggest any question as to the mode of supplying, or the mode of raising, funds to defray the costs of supplying, the Queen's navy or Her arsenal, or the inhabitants of *Plymouth*, with water by means of the leat. And as to any surplus of the funds raised beyond the amount of the costs actually incurred, I say only, that I do not think that the corporation were lawfully entitled, by giving any part of it to an assignee for payment of their own debt, to make it the interest of themselves and of their assignee to demand from those who are entitled to be supplied with water a greater revenue than was required for the purpose.

And

And upon the best consideration which I have been able to give to the instrument, I think, that no more was or was meant to be conveyed, than one fourth part of so much of the water flowing in the leat or watercourse as came and went to the mills; and that, by the water coming and going to the mills, no more than that which remained, after satisfying the public purposes of the act, could be or was intended to pass. The words of the deed are not, perhaps, strictly correct, but any ambiguity arising from the use of the word "leat" appears to me to be removed by the annexed words, "watercourse coming and going," by the nature of the case, and I think, also, by the subsequent conduct of the parties, as appears by the evidence. I am, therefore, of opinion, that the Attorney-General is not entitled to the declaration which he asks, as to the right of the hospital, under the indentures of the 6th of *October* 1653, and the 10th of *May* 1655.

1845.  
The  
ATTORNEY-  
GENERAL  
v.  
The Corpor-  
ation of  
PLYMOUTH.

Upon the other object of the information, which relates to the validity of the transaction in 1805, I own that I have not been able to consider the corporation of *Plymouth* and the corporation of the *Hospital of Orphans Aid*, as two distinct and independent corporations, capable, in equity, of dealing adversely with each other, in matters affecting their interests when opposed. It is, I think, manifest, that the hospital was always treated and considered as dependant on the corporation of the town, and that habitually the property of the hospital was not left to the independent control of the governor, assistants, and wardens, but was frequently made use of for the convenience of the mayor, aldermen and burghesses. There is no evidence to shew that this was dishonestly done, or that the hospital was in any manner defrauded, or even in any manner a sufferer, but supposing that the corporation of the town, from time to time,

1845.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 The Corpor-  
 ation of  
 PLYMOUTH.

time, did that which was best for the hospital, it would still appear that it was done at the will and by the direction of the corporation of the town, and, considering the close connexion between them, and their relative position, it could hardly be otherwise. The governor of the hospital was the person who had last been mayor — the assistants were chosen from the magistrates or aldermen, and the wardens from among the common councilmen, and the corporation of the town was the visitor of the hospital. The connexion being such, I do not think that the two corporations can, in this Court, be considered as capable of making a contract in a matter in which their interests are opposed.

I certainly am not satisfied, upon the evidence before me, that the hospital did not receive an adequate consideration for the rights and interests purported to be alienated; and if the case rested upon want of consideration only, I should not think it right to disturb the transaction; but on the other ground, I think that it ought to be set aside, and, therefore, if the Attorney-General desires it, I must declare,

That, under the circumstances of this case, the conveyance of the 22d day of *June* 1805 is void in equity, and that the same ought to be delivered up to be cancelled.

And with a view to the consequences and effect of that declaration, I think that, at the request of the Defendants, I ought to declare,

That the hospital was not, under the indentures of the 6th day of *October* 1653, and the 10th day of *May* 1655, entitled to any share of, or interest in, the water, or any profit arising from the water supplied to the town or  
 haven

haven of *Plymouth*, by means of the *Plymouth* leat or watercourse, or to any rent, fines, tolls, or monies paid on account, or in respect, of any such water or supply thereof; and that, under and by virtue of the same indentures, there passed thereby, and the hospital acquired, no interest in the water flowing in the leat, other than in such part thereof as came and went to the mills in the said indentures mentioned, after supply of the said town and haven :

1845.  
The  
ATTORNEY-  
GENERAL  
v.  
The Corpor-  
ation of  
PLYMOUTH.

And having regard to that declaration, refer it to the Master to ascertain and state the particulars of the property comprised in the said indentures, and how the same were known and distinguished in the month of *June* 1805 :

And take an account of the several sums of money which have been received and paid by the corporation of *Plymouth* on account, or in respect, of such property, from the month of *June* 1805 up to the date of his report.

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1845.

Jan. 29.  
April 22. 29.  
Nov. 10.

## SMITH v. SMITH.

*A. B.*, a married woman, conveyed her separate estate to *C. D.*, in trust to sell &c., and pay a debt due to him from her, and further advances, not exceeding in the whole 400*l.*, and to hold the surplus for her separate use. *C. D.* afterwards made further advances far exceeding the limit, part of which was paid upon bills drawn on him by *A. B.* with directions "to charge the same to the account of" her separate estate. Held, that *C. D.* was not entitled to appropriate his receipts, in the first place,

in payment of the advances not covered by the security, the Court considering that *C. D.*'s receipts could not be considered as indefinite payments; that he had them only for the purpose of paying off the charge, and afterwards for *A. B.*'s separate use; and that, upon the true construction of the instruments, *C. D.* was bound to apply the separate estate which he received, in satisfaction of the charge, and could only consider the surplus, after such satisfaction, as subject to the disposition of *C. D.*, or liable to such ordinary lien as he might acquire by advancing

**T**HIS case came on upon the petition of *Anne Johnson*, praying that the Master's report, dated the 8th of *December* 1844, might be confirmed, and for consequential directions, and upon a cross petition of *Mr. Gregory*, praying, for the purposes therein mentioned, that the petitioner might be at liberty to except to the report, and that it might be referred back to the Master to review the same.

In *September* 1820, *Mr. Smith*, the first husband of *Mrs. Johnson*, died intestate, leaving her entitled to dower, her right to which was established by proceedings in this Court; and on the 10th of *January* 1827, she made some arrangements or agreement, as to part of her interest in her dower, with a person of the name of *Kendal*, and some question arose as to the performance of that arrangement or agreement.

In *April* 1827, she contemplated the marriage which took effect between her and *William Cocks Johnson*, and on that occasion, marriage articles were executed, whereby it was agreed, that her dower should be conveyed to trustees, in trust for her separate use, and enabling her to dispose of any residue by deed or will.

She

She married *Johnson* on the 19th of *May* 1827, and in the course of the proceedings in the cause, a Receiver was appointed of the rents out of which her dower was to be paid.

1845.

SMITH  
v.  
SMITH.

On the 2nd of *July* 1828, a deed was executed, between *Mrs. Johnson* of the first part, her husband *William Cocks Johnson* of the second part, and *David Lloyd Harries* of the third part. *Harries* had previously advanced her two sums of 80*l.* and 20*l.*, and then lent her an additional sum of 50*l.*; and it being contemplated that he might make her further advances, the dower was conveyed to *Harries*, on trust to sell it, and, after paying costs out of the purchase money, he was to repay himself the three sums of 80*l.*, 20*l.*, and 50*l.*, and any further sums, not exceeding 600*l.*; and *Harries* was enabled either to perform the contract of *Kendal*, or to resist the claim of *Kendal* under that contract, as should be expedient.

In the month of *August* 1830, the petitioner, Mr. *Gregory*, had advanced to *Mrs. Johnson* different sums, amounting to 280*l.*, and he then lent her an additional sum of 50*l.*, and further advances being contemplated, a deed, dated the 20th day of *August* 1830, was executed between *David Lloyd Harries* of the first part, *Mrs. Johnson* of the second part, her husband of the third part, and Mr. *Gregory* of the fourth part, and thereby *Mrs. Johnson's* dower was conveyed to Mr. *Gregory*, on trust to sell it, and receive the purchase money, and in the mean time to receive and take the dower, and out of the monies to arise by the sale or in respect of the dower, to pay the costs therein mentioned, and then what should be due to *Harries*, and afterwards to pay himself the 280*l.* and 50*l.*, and such further sums as he might lend, or lay out or expend to or for the use of *Mrs. Johnson*,



1845.

SMITH

v.

SMITH.

so as the same, together with the 280*l.* and 50*l.*, should not exceed the full sum of 400*l.* And he was to stand possessed of the surplus, in trust for the separate use of Mrs. *Johnson*.

In a few days after the date of this deed, and on the 26th day of the same month of *August* 1830, *Gregory*, at the request of *Johnson* and wife, paid to *Kendal* 150*l.*, and, in consideration thereof, *Kendal* agreed and undertook to assign his right and interest under his contract of the 10th of *January* 1827 to *Gregory*, in trust for *Johnson* and wife; and it was agreed between *Gregory* and *Johnson* and wife, that the sum of 150*l.* and costs, paid by *Gregory*, should, to all intents and purposes, be considered as included in and provided for by the trusts of the deed of the 20th of *August* 1830, as if the agreement and the release and assignment thereby contemplated had been made before the execution of that deed.

After the execution of the deed of the 20th of *August* 1830, *Gregory* entered into the receipt of the dower, and on the application of Mrs. *Johnson*, he subsequently made repeated advances of money to her, and made other payments on her account. Some of such payments were made by bills drawn by Mrs. *Johnson* on Mr. *Gregory*, and he was directed by the bills "to charge the same to the account of her dower," and at other times "to charge" or "to place" the same "to account."

By an order, made on the petition of Mrs. *Johnson* on the 7th day of *August* 1840, it was referred to the Master to inquire, whether any, and what, sum was due to *David Lloyd Harries* under the deed of the 2d of *July* 1828; and if any sums payable to him had been,  
by

by whom and when paid. And the Master was to take an account of what had been expended by *Gregory*, for principal, interest, and costs under the deed of the 20th of *August* 1830, and of all sums received, or which but for wilful default might have been received by *Harries* and *Gregory*, or either of them, on account of the dower of *Mrs. Johnson*; and also to inquire, whether *Gregory* had made any other advances on account of *Mrs. Johnson*, and whether *Gregory* had any, and what lien on the dower or the purchase money thereof, with liberty to the Master to state special circumstances.

1845.


 SMITH  
v.  
SMITH.

The Master made his report on the 8th day of *December* 1842, and thereby found the amount due on the balance of the account for principal money, interest, and costs, under the deed of the 2d of *July* 1828, up to the 24th of *May* 1839, to be the sum of 414*l.* 16*s.* 11*d.*, and that such sum had been paid by *Gregory* to *Harries*; and in taking the account of what was due under the deed of the 20th of *August* 1830, he considered the limitation as to the sums therein mentioned to have been extended by the agreement of the 30th of *August* 1830, so as to embrace the sum of 150*l.* intended to be provided for by such agreement, and so considering, found that there had been expended by *Gregory* for principal money, interest, and costs, under the same deed as extended by the agreement, the sum of 832*l.* 4*s.* 10*d.* And he found, that, under the deed of the 2d of *July* 1828, and also the deed of the 20th of *August* 1830, *Gregory* received several sums, amounting together to the sum of 1222*l.* 9*s.* 9*d.* on account of the dower of *Mrs. Johnson*. The Master then added the amount of *Gregory's* expenditure, and deducted his receipts as follows:—

1845.	£	s.	d.	
<u>SMITH</u>	832	4	10	expended by <i>Gregory</i> under the deed.
v.	414	16	11	balance paid to <i>Harries</i> .
<u>SMITH.</u>				
	1247	1	9	
	1222	3	9	<i>Gregory's</i> receipts.
	24	18	0	balance due to <i>Gregory</i> .

And he further found, that *Gregory* had expended other sums for Mrs. *Johnson* to the amount of 465*l.* 7*s.* 10*d.*, for which he did not find that *Gregory* had any lien.

On the 22d day of *April* 1843, and upon the petition of Mrs. *Johnson* that the Master might be directed to review his report, it was referred back to the Master to review his report as to the 150*l.* included in the agreement of the 26th of *August* 1830, and Mr. *Gregory* to make such further claim, as to the said sum of 150*l.*, as he might be advised.

The Master, by his report dated the 8th *December* 1844, reviewed his former report, and found, that the sum of 705*l.* 15*s.* 9*d.*, instead of the sum of 832*l.* 4*s.* 10*d.* found by the former report, was due and owing to *Gregory*, under the indenture of the 20th of *August* 1830; and he further found, that, in the result of his inquiry, there was due from *Gregory* a balance of 101*l.* 11*s.* 1*d.*, instead of being a balance of 24*l.* 18*s.* due to him, as found by the former report; and he further stated, that *Gregory*, pursuant to liberty given him, brought in a state of facts and charge, which the Master did not think fit to allow.

This report was objected to, and was the subject of the present petition, by which Mr. *Gregory* desired to have

have it considered, that no part of the sum of 1222*l.* 3*s.* 9*d.*, received by him on account of dower, ought to be considered as received on account of the sums due to him under the indentures of *July* 1828 and *August* 1830, until after payment of the several sums, amounting to 465*l.* 7*s.* 10*d.*, found due to him; or that he might be considered as being a mortgagee, or to have a lien, under the agreement of the 26th of *August* 1830, for the 150*l.* and interest, on so much of the dower of Mrs. *Johnson* as should remain in his hands, after satisfying the debts or sums of money specified in the report of the 8th of *December* 1842. And he desired either an order giving him the benefit of those claims, or such other order as should seem meet.

1845.  
SMITH  
v.  
SMITH.

Mr. *C. J. Selwyn*, on behalf of Mr. *Gregory*, argued, that he had a right to appropriate his receipts in payment of any of the items of the account between him and Mrs. *Johnson* as he pleased; *Mills v. Fowkes* (a), *Philpott v. Jones* (b), *Arnold v. The Corporation of Poole* (c), 1 *Selwyn's N. P.* (d); that it was equitable that the current yearly receipts should be set against the current yearly payment: and that there had been an express appropriation made by Mrs. *Johnson*, by her bills on Mr. *Gregory*, drawn "on account of dower" &c., which constituted a charge on her separate estate: *Crosby v. Church* (e).

Mr. *Turner* and Mr. *W. R. Ellis*, on behalf of Mrs. *Johnson*, *contra*.

The MASTER of the ROLLS reserved judgment.

The

(a) 5 *Bing. (N. C.)*, 455.

(d) 137. (11th ed.).

(b) 2 *Adol. & El.* 41.

(e) 3 *Beavan*, 485.

(c) 4 *Man. & Gr.* 860.

1845.

SMITH

v.

SMITH.

*The MASTER of the ROLLS.*

There seems to be no doubt that Mr. *Gregory* has paid on account of Mrs. *Johnson* a greater amount of money than he received on account of her dower. The whole sum received amounts to 1222*l.* 3*s.* 9*d.* The sums as even now allowed for principal, interest, and costs under the deeds amount to 1120*l.* 12*s.* 8*d.*, and the Master has found that a further sum of 465*l.* 7*s.* 10*d.* was advanced.

Mr. *Gregory* was entitled to receive Mrs. *Johnson's* dower, and to apply the same in satisfaction of the sums which were due to him under his deeds; and as to the surplus of it, he was trustee for Mrs. *Johnson* for her separate use.

Mrs. *Johnson* had no right to divest any portion of it from that first application to which Mr. *Gregory* was entitled; and if the directions of the deed had been simply followed, the question now made would not have arisen, but Mrs. *Johnson* was entitled to the surplus, and seems to have been continually in want of money, and she repeatedly applied to Mr. *Gregory* to supply her with money, or to make payments for her, and he frequently did so.

It has been held, that, with respect to any money advanced beyond the limits stated in the deed, he has no claim or lien under the deeds; but he now says (if I correctly understand him), that, having received the dower which, subject to his own rights under the deed, belonged to Mrs. *Johnson* for her separate use, he had a right, in his application, to prosecute his rights under the deeds, and apply his receipts, in the first place, in satisfaction of her payments or advances made on account of Mrs. *Johnson*.

Further,

Further, he insists, that if at any time any portion of the limited charge under the deeds was paid off, he had a right to bring any subsequent advance to Mrs. *Johnson* under the deeds, in lieu of so much of the charge as had been paid off, and thus to keep up the charge to the extent of the limit, although some part of it might have been paid off: and, further, he contends, that if he was not so entitled, if he was bound, under the trusts of his deeds, to exonerate the dower from the charge under the deeds, before he applied any part of it to the use of Mrs. *Johnson*, yet that, at all events, after the charge was satisfied, he was, at the request of Mrs. *Johnson*, entitled to apply any surplus to her use, according to her directions; and ought to be allowed, as against the surplus, not only such sums as he paid by her directions out of her dower, but also such sums as he applied to her use, under her authority, without special reference to the dower, as the fund out of which such sums were to be paid. In other words, he contends, that the surplus dower, after paying the limited charge, was money in his hands on account of Mrs. *Johnson*, which, under the circumstances, he had a right to apply to her use, whether she specifically directed the payment to be made out of her dower or not.

1845.


 SMITH  
v.  
SMITH.

The case argued does not appear to me to be consistent with the case indicated by the objections carried in to the Master's present report; and it is not confined to the claim which, by the terms of the order of *April* 1843, was specially permitted to be made; and Mr. *Selwyn*, who argued the case, has, therefore, not desired any decision in favour of Mr. *Gregory*, at this time, but, having regard to the order of 7th of *August* 1840, has requested special leave to make a claim in conformity with the case he has argued.

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Upon

1845.

  
 SMITH  
 v.  
 SMITH.

Upon the argument, it does not now appear to me that Mr. *Gregory* has any claim under the deeds, beyond that which the Master has found. I think that his receipts of dower cannot be considered as indefinite payments. He had them only for the purpose of paying off the charge, and afterwards for the separate use of Mrs. *Johnson*; and upon the true construction of the instruments, I think that he was bound to apply the dower which he received in satisfaction of the charges, and could only consider the surplus, after such satisfaction, as subject to the disposition of Mrs. *Johnson*, or liable to such ordinary lien, as he might acquire by advancing money to her.

Supposing this to be so, the surplus was, at all events, subject to the disposal of Mrs. *Johnson*: it was apparently the only money which became, or was ever likely to become, payable by *Gregory* to Mrs. *Johnson*, the only sum, in respect of which Mrs. *Johnson* had any right to draw upon him, or any ground for asking him to pay money on her account, and when she drew a bill upon him, with a direction to Mr. *Gregory* "to charge the same to the account of her dower," or even without that special reference, when she drew bills upon him, with a direction "to charge" or "place the same to account," she probably meant, and *Gregory* had reason to believe she meant, that, besides satisfying the charge created by the deeds, he was to be entitled to credit for those sums, in the account of the money which remained: and under these circumstances, there seems to be some reason to think that Mr. *Gregory* may have been entitled to a lien on the surplus, and I think it would not be just to leave the matter in its present state. Mr. *Gregory* is found a debtor, in a case in which his payments for Mrs. *Johnson* have exceeded his receipts: and although he has, I think, mis-  
 taken

taken his own case, first, in supposing that he was entitled to the whole of his claims under the deeds, and now, in thinking that he has a right to intercept monies which ought to be applied in satisfaction of the charge, and apply them, in priority, to the satisfaction of sums due to him which were not charged, yet, upon his paying the costs occasioned by the claims which have failed and of this petition, I think that he ought to be allowed to make a claim, at least to the extent of 150*l.* mentioned in the former order, for what he may allege to be due to him out of the surplus of his receipts, after applying so much thereof as was required for the satisfaction of the charges.

1845.  
SMITH  
v.  
SMITH.

He has prayed relief inconsistent with the limitation contained in the order of 22d of *April* 1843, but has not prayed to be relieved from it. When that order was made, it seems to have been considered, and the Master has reported, that there was no lien, except under the instruments of the 20th and 26th of *August* 1830; and it does not appear from the papers before me, that any attempt was made to disturb that part of the report. Considering the state of the fund, and the liability to costs to which Mr. *Gregory* is subject, it may not be worth his while to adopt any proceeding, for the purpose of relieving himself from the limitations contained in the order of the 22d of *April* 1843. If it were, I should be disposed to give him leave to amend this petition.

But upon the case, as it stands now, and Mr. *Gregory* paying the costs of the last report, of the objections, and of this petition, let him be at liberty to carry in another claim, and, with reference to such claim, if made out to the satisfaction of the Master, let the Master be at liberty to review his report.



1845.

Nov. 20. 21.  
22.

## LANGLEY v. FISHER.

Observations as to the legal and equitable right of parties to bar known existing adverse claims by fine and non-claim.

If, in levying a fine, a direct fraud is practised, this Court has undoubted jurisdiction to give relief; but the mere fact that a party levying a fine has good reason to believe, that if he did not do so, an adverse claim might or would be established against him, has never been considered as sufficient evidence of a gross fraud, to induce this Court to grant relief.

IN 1784, by settlement made on the marriage of *Robert Langley* with *Mary* his wife, the *Charter House Hinton* estate, with other freehold estates, was conveyed to the use of the husband and wife, successively, for life; and in case there should be only one child of the marriage (which happened), or, being more than one, all of them but one should die before twenty-one, then to the use of such only child, his or her heirs or assigns for ever. There was a limitation in favour of the children, if there should be several, "and in default of issue of the said intended marriage," then the *Charter House Hinton* estate was limited to such uses as the wife should, by will, &c., appoint; and in default of appointment to her own right heirs.

*George Dike Fisher* was party to the settlement as one of the releasees to uses and as one of the two trustees to preserve contingent remainders.

There was issue of the marriage one child only, namely, *Susan Langley*, who was born in 1786, and died an infant in 1787.

*Robert*

An estate was settled on husband and wife for life, with a limitation to their issue, and, in default, a power of appointment was given to the wife. There was one child only of the marriage, who died an infant. The wife survived her husband, and appointed the estate to *G. D. F.*, who was the releasee, to uses, and had possession of the settlement. *G. D. F.*, shortly after the wife's death, made a feoffment, and levied a fine with proclamations. After the expiration of the five years, the heir of the child claimed the estate, insisting that, under the terms of the settlement, the child took the estate in fee, and that the power of appointment had never arisen. He filed a bill against *G. D. F.* to avoid the fine, alleging that it had been levied with full knowledge of the Plaintiff's rights, and, with a fraudulent view, to bar them. Held, that the act of *G. D. F.* did not constitute a fraud, that *G. D. F.* stood in no fiduciary relation towards the Plaintiff, and the bill was dismissed with costs.

Where a Plaintiff imputes personal fraud which is not proved, it is a reason for awarding costs against him on a dismissal of his bill.

*Robert Langley* died in 1815, having by his will appointed *George Dike Fisher* and *Mr. Prideaux* (a solicitor), and his widow, trustees of other property for the Plaintiff and his brothers.

1845.  
  
 LANGLEY  
 v.  
 FISHER.

*Mary Langley* his widow, died in 1820, having, by her will, appointed the *Charter House Hinton* estate to *George Dike Fisher* in fee. It was a question in the cause, whether (inasmuch as there had been issue of the marriage) the power of appointment had ever arisen, as, if it had not, then the estate would, independently of subsequent transactions, have descended to the Plaintiff as heir-at-law of the deceased child *Susan Langley*. However, upon the death of *Mary Langley*, her appointee, *George Dike Fisher* entered into possession of the estate. He was, as before stated, the releasee to uses and trustee to preserve contingent remainders under the settlement of 1784, and he had possession of the settlement of 1784.

The Plaintiff, who had been resident at the *Cape of Good Hope*, came to *England* soon after the death of *Mary Langley* in 1820. He alleged by his bill, that he then employed his brother, *Thomas Langley*, to confer with *Prideaux* (the solicitor and son-in-law of *George Dike Fisher*), as to his, the Plaintiff's, rights to the property, and that *Prideaux*, acting as the solicitor for both *Fisher* and the Plaintiff, fraudulently represented to *Thomas Langley*, that he, the Plaintiff, had no title to the estate, and that the Plaintiff, relying on such representations, had been induced to abstain taking any proceeding to recover the property.

On the 28th of *June* 1822, *George Dike Fisher*, by the advice and through the instrumentality of *Prideaux*, executed a feoffment; and in *Trinity Term* 1822, he levied

1845.  
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 LANGLEY  
 v.  
 FISHER.

levied a fine with proclamations of the property, and the five years expired in 1827, without any steps having been taken to avoid it.

The Plaintiff returned to the *Cape of Good Hope* in 1823, and remained there until 1835, when he returned to *England*; but more than five years having elapsed from the levying of the fine, the Plaintiff was, at law, absolutely barred of any right, to which, as heir of *Susan Langley*, he was entitled under the settlement of 1784 (a).

The Plaintiff insisted, that *Prideaux* had fraudulently misrepresented the rights to which the Plaintiff was entitled under the settlement: that the feoffment and fine had been made and levied for the fraudulent purpose of defeating those rights, the Plaintiff, during the five years, being kept in ignorance of his rights, and deluded into inactivity by the misrepresentations of *Prideaux*.

The bill prayed for the delivery to the Plaintiff of the *Charter House Hinton* estate, and that the fine might be declared to enure to his use and for consequential relief.

The Defendants stated, they believed that the fine was levied by the advice of *Prideaux*, for the purpose of strengthening the title of *George Dike Fisher* and for removing all doubts as to the validity thereof, and to protect him from any claims which might be set up by the Plaintiff or any other person to the property.

With regard to the evidence in this case, it is to be observed, that the Plaintiff's brother, *Thomas Langley*,  
 had

(a) 4 Hen. 7. c. 24.

had died: that *George Dike Fisher* was also dead, and that the Plaintiff having attempted to examine *Prideaux*, who had disclaimed, as a witness in the cause, he demurred to the interrogatories, on the ground of his wife's interest, and the demurrer was allowed (a). The Plaintiff was, consequently, deprived of his testimony, as well as of that of the two other deceased persons. To supply, in some measure, the loss, the Plaintiff proved, by a witness, *Price*, that in an interview with *Prideaux* in October 1830 the latter admitted that he stated to *Thomas Langley*, in 1821, that the Plaintiff had no claim to the estate. This admission was not, however, alluded to in the bill.

1845.  
LANGLEY  
v.  
FISHER.

The cause now came on for hearing.

Mr. *Tinney* and Mr. *Malins*, for the Plaintiff, contended, first, that under the limitations in the deed of 1784, the Plaintiff, as heir of *Susan*, had, in the events which had happened, become absolutely entitled to the estate. [No decision was made on this point, but the following authorities were cited upon it during the argument: *Carter v. Barnardiston* (b), *Loddington v. Kime* (c), *Doe v. Selby* (d), *The Earl of Sussex v. Temple* (e).]

Next, they argued as follows: — This Court has undoubted jurisdiction to relieve against every species of fraud; *The Earl of Chesterfield v. Janssen* (g); and a party cannot avail himself of a legal title if obtained under circumstances of fraud: *Mestaer v. Gellespie* (h), *Allen v. Macpherson* (i). There is nothing peculiar in the

(a) 5 *Beavan*, 443., 1 *Phil* 692.

(b) 1 *P. Wms.* 505.

(c) 1 *Salk.* 224., and 1 *Ld. Raymond*, 203.

(d) 2 *B. & Cress.* 926.

(e) 1 *Ld. Raymond*, 311., and *Fearne's Contin. Rem.* 313.

(g) 2 *Ves. sen.* 155.

(h) 11 *Ves.* p. 624. 628.

(i) 5 *Beavan*, 469.

1845.  
 LANGLEY  
 v.  
 FISHER.

the case of a fine, which, where there is fraud, this Court will relieve against. *Bulkley v. Wilford* (a), *Cartwright v. Pultney* (b). The Defendants claim derivatively through *George Dike Fisher*; but parties cannot retain property obtained through the fraud of others: *Huguenin v. Baseley* (c).

Here, it is clear that a fraud was intended. *Prideaux*, having full notice of the terms of the settlement, fraudulently persuaded the Plaintiff, who was wholly ignorant of his rights, that he had no title whatever; and having thus lulled him into inactivity, he then advised *George Dike Fisher* (without any assignable object, except to deprive the Plaintiff of his rights) to make a feoffment and levy a fine with proclamation. *George Dike Fisher* was bound by the notice and fraud of his solicitor, and could not, under such circumstances, set up the fine and nonclaim against the Plaintiff, who was not only labouring under the misrepresentation, and in ignorance of his rights, but was also absent from *England*.

Again, *Fisher* stood in a fiduciary character under the deed of 1784. As releasee to uses, he was entitled to the possession of the deed of 1784, as trustee for the Plaintiff (d). *Hooper v. Ramsbottom* (e), *Read v. Brookman* (g), *Whitfield v. Hanset* (h). He was therefore bound to furnish the Plaintiff with full information as to his rights under the settlement, and could not avail himself, as against his *cestuique trust*, of any legal rights acquired by him through his own neglect to afford full  
 and

(a) 2 Cl. & Fin. 102.

(b) 2 Atk. 390.

(c) 14 Ves. 273.

(d) 1 Sand. Tract. 119. (4th edn.)

(e) 6 Taunton, 12.

(g) 3 Term Rep. 156.

(h) 1 Ves. Sen. 393.

and proper information ; *Segrave v. Kirwin (a)*, *Bulkley v. Wilford (b)*.

1845.

LANGLEY  
v.  
FISHER.

Mr. Kindersley, and Mr. Phillips, and Mr. Turner, and Mr. W. W. Cooper, for parties claiming under *George Dike Fisher*, deceased, argued : —

First, that *George Dike Fisher* was entitled to the estate under the appointment made by *Mary Langley*.

Next, that no fraud whatever had been proved or existed ; for, as to the representation alleged to have been made by *Prideaux* to *Thomas Langley*, there was no evidence whatever that any communication had ever taken place between them, except the admission by *Prideaux*, said to have been made ten years afterwards. That such admission was not evidence against the Defendants, and that not having been expressly charged by the pleadings, it could not be received. That the mere fact of *George Dike Fisher* having levied a fine, which was a common legal assurance, to perfect his title and remove all question, could not be considered as any evidence of fraud. That such a proceeding was common, and that if it were considered as a badge of fraud, innumerable titles might be impeached on the same ground.

That *George Dike Fisher* stood in no position of trust, and that all trust ceased upon the death of *Mrs. Langley*. That even if *Prideaux* had made the statement attributed to him, there was nothing inconsistent with *bona fides* in it ; for such was his opinion, upon the construction of an instrument so doubtful, that counsel could not

(a) *Beat.* 157.

(b) 2 *Cl. & Fin.* 102.

1845.  
  
 LANGLEY  
 v.  
 FISHER.

not now agree upon it, and was even, at the present moment, the subject of serious discussion.

*Pearson v. Morgan (a), Mackreth v. Symmons (b), Kennedy v. Green (c), Beckford v. Wade (d), Ainslie v. Medlycott (e), Fullagar v. Clark (g), Matthews v. Erbo (h),* were also cited.

Mr. C. P. Cooper, and Mr. Lovat, for mortgagees under *G. D. Fisher*.

Mr. Prideaux for other parties.

Mr. Tinney in reply.

Nov. 22. *The MASTER of the ROLLS.*

The bill, in substance, prays, that the fine may be declared to enure for the benefit of the Plaintiff, as entitled, under the limitations of the settlement; and the ground of that prayer is, that it was levied in the execution of a systematic fraud, practised by *George D. Fisher*. He took possession of the estate under colour of the appointment made by *Mrs. Langley*, and it is alleged to be perfectly clear, that upon the construction of the settlement, the appointment was invalid, and that *Susan*, in whose right the Plaintiff claims, was entitled to an estate in fee.

The first question which I have to consider is, whether I ought, in any way, to deal with the rights of

(a) 2 B. C. C. 388.

(b) 15 Ves. 328.

(c) 3 Myl. & K. 699.

(d) 17 Ves. 87.

(e) 9 Ves. 13.

(g) 18 Ves. 483.

(h) 1 Ld. Raymond, 349.

of the parties under that fine, enuring, as it now does, to the benefit of the Defendants. The Plaintiff's claim can only be made effectual by first disposing of the fine, and looking at the evidence for the purpose of seeing under what circumstances the fine was levied, it is very painful to observe that the case must probably be disposed of in the absence of very material evidence, for there are three persons who could have furnished important information upon the question whose evidence cannot be had, two being dead, and the other not being examinable.

1845.  
  
 LANGLEY  
 v.  
 FISHER.

[His Lordship stated the circumstances of the case anterior to 1808.]

In the year 1808, *Robert Langley* made his will, by which he devised certain estates to *Mary Langley*, his wife, *George Dike Fisher* (who was one of the trustees in the marriage-settlement), and to Mr. *Prideaux*, whose name has been so much called into question on the present occasion. They were made trustees of those estates for the benefit of the Plaintiff and the other children of the testator's brother *Benjamin*. *Robert Langley* having made this will in the year 1808, died in the month of *August* 1815, and thereupon, as far as is seen here, a certain fiduciary character was established in *Prideaux* for the benefit of the children of *Benjamin Langley*, amongst whom was the Plaintiff.

*Robert Langley* having died in the month of *August* 1815, we find, that in the course of the very next month, *Mary Langley*, the widow, made her will, by which she took upon herself to execute the power of appointment given to her "in default of issue" of her marriage with *Robert Langley*. She died in the year 1820, and thereupon, her appointee *George Dike Fisher* took possession.



1845.

LANGLEY  
v.  
FISHER.

session, under colour of that appointment. Under those circumstances, he might, no doubt, have thought, that he was entitled to take it under the appointment, and might have treated the matter as if effect was to be given to the gift over in default of issue. Unfortunately we have no evidence as to what his view of the case might have been. Nevertheless, and this is a striking part of the argument, I am called upon to assume, that he had a perfectly clear and familiar knowledge, at that time, that he had no right whatever under that appointment, and that the estate was, in point of fact, vested in the heir-at-law of *Susan*, who had died thirty-three years before. That point has not only been relied upon in the course of the argument, but has been urged upon me over and over again, as being so clear that nobody could doubt it.

However, *George Dike Fisher* being thus in possession, either knowing or not knowing that he had no title, the Plaintiff, whose usual residence was at the *Cape of Good Hope*, arrived in *England* in the course of the next year; and then took place those circumstances which are relied on as the foundation of the imputed fraud. Mr. *Prideaux* was a solicitor carrying on business at *Bristol*. He had married a daughter of *George Dike Fisher*, the appointee of *Mary Langley*. He was the trustee of the will of *Robert Langley*, for the benefit of the Plaintiff and his brothers, and, as such trustee, he had duties towards them. As such trustee it was natural, and in every way proper, that he should be in communication with them, for he was in the situation of an accounting party to them, and they were his *cestuique trusts*. There were, therefore, abundant motives for some communication taking place between him and the Plaintiff and his brother. This bill alleges, that he was then both the solicitor of the Plaintiff

and

and of *George Dike Fisher*, and the Defendants have taken advantage of that allegation, although there is no other proof of it, and if the Plaintiff had not so alleged, I should have been very much inclined to doubt the fact. Now we must consider which of the facts alleged by the Plaintiff have been proved by the evidence; and, with regard to the communications which took place between the parties, I think it is not proved that *Thomas Langley*, the brother, went expressly to *Bristol* for the purpose of inquiring into this matter, and made his application to *Mr. Prideaux*, as the agent or solicitor of *Fisher*. There is no direct or immediate proof of any thing that took place between *Thomas Langley* and *Prideaux*. That some communication took place relating to this matter, I believe, from the correspondence which afterwards took place. Somehow or other it happened that *Thomas Langley*, the brother of the Plaintiff, was the medium of communication between the Plaintiff and *Prideaux* in respect of these matters; but that correspondence does not shew what passed between them, except that it is therein stated by *Thomas Langley*, that his brother had been convinced that he had not a just claim, and *Mr. Prideaux*, in answer, stated, that it was gratifying to him to find that the Plaintiff took such a correct view of the matter. As to any thing like direct evidence of that which took place between *Thomas Langley* and *Prideaux*, there is none.

1845.  
  
 LANGLEY  
 v.  
 FISHER.

Some time afterwards, *Prideaux* advised *George Dike Fisher* to levy a fine. I have very little to observe about levying fines, and the fraudulent uses which may be and have been made of them. I believe it has been a common practice for men who think that they have a just title, though so circumstanced as to be open to dispute and likely to expose them to expensive litigation,



1845.

LANGLEY

v.

FISHER.

litigation, to cause fines to be levied, or to levy fines for the very purpose of shortening the time within which such adverse claims may be made. I do not mean to say that a fraudulent use may not, in many instances, have been made of that proceeding, and that many a fine has not been levied by persons, who, in their hearts, very well knew and have been advised, that another man had a better and a more legal and equitable right to the property than themselves, and that such persons have adopted those means to cut off such a claim; but all that is to be said about it is, that those means of strengthening a title have over and over again been allowed. If a direct fraud is practised upon some known person, in levying the fine, then, according to the various cases in the books on the subject, this Court will set the matter right; but I believe that the mere fact that a party levying a fine had, at the time, very good reason to believe, that, if he did not do so, an adverse claim might or would be established against him, has never been considered as sufficient evidence of a gross fraud, by reason of which this Court ought to grant relief.

However, Mr. *Prideaux* advised the levying of a fine, and the fine was levied. Many years afterwards something occurred which is supposed to throw light upon what passed in the year 1821. Mr. *Price*, who was present at an interview between Mr. *Prideaux* and *Thomas Langley*, sets forth the conversation which he then heard, and states, that, in such conversation, it was admitted by Mr. *Prideaux*, that, in the year 1821, he did state that the Plaintiff had no title. Asking for evidence of what took place in the interview between *Prideaux* and *Thomas Langley* in the year 1821, I am desired to come to an express conclusion on the subject, from something which *Prideaux* stated to *Thomas Lang-*

ley in the presence of *Price* in 1830. As to this evidence, there are various things to be taken into consideration : first of all, has the attention of the parties been drawn to this in the pleadings? Was it ever stated or alleged, "that, as evidence of the communications which took place in 1821, there was such and such a conversation which took place in 1830." I believe that there is no hint of any thing of the kind given in the pleadings; and it is a rule of this Court, that conversations and admissions between persons are not to be produced as evidence of certain facts, unless they are expressly drawn to the attention of the parties in the pleadings, and here it has not been done. But even suppose it had been, then comes another very important question, whether *Fisher* is to be fixed with such a fact against his interest, by the admission of his agent, because *Prideaux*, in the year 1830, thought fit to tell *Thomas Langley* what had taken place in 1821.

1845.  
LANGLEY  
v.  
FISHER.

I am under the necessity of coming to the conclusion that there is no evidence, which this Court can properly consider as binding and convincing, of the communications which took place between *Prideaux* and *Thomas Langley* in 1821.

But if he did say in 1830 that the Plaintiff had no right, and did shortly afterwards advise Mr. *George Dike Fisher* to levy a fine, still, notwithstanding what is said about the exceeding clearness of this settlement, might it not have been perfectly honest and consistent with the duty of any man, consulted by a friend, to say, "I do not think there is the least right here — nevertheless there is some colour for it — there may be some unpleasant litigation about it — I would recommend you to cut the matter short, and levy a fine?" If the first sort of proposition put forward by the Plaintiff

1845.

LANGLEY  
v.  
FISHER.

could be maintained, that a fine ought to be set aside or modified, on the ground of fraud, because it had been levied by a person who had good reason to believe there was an adverse claim, I think it would extend to a great many more fines than this, and I do not know what would be the result of it.

What I have been very anxious to ascertain, during the argument of this case, was this, whether the situation of Mr. *Fisher* was such, that he, receiving advice, which we may suppose, for the moment at least, was communicated to him by Mr. *Prideaux*, could not, without fraud, levy that fine; for I certainly do not see that a man in possession of an estate, being advised that he is entitled to it justly, but that troublesome questions may be raised as to it, may not levy a fine, without its being considered fraudulent, and subject to be set aside. In this case, there is a total absence of proof of any thing that passed between *Prideaux* and *George Dike Fisher* on the subject of the title, and it is not made out, that Mr. *Fisher* was in such a situation as to know a great deal more than is known by persons generally as to the title to their estates. Then there comes the question, whether *Fisher* owed to the Plaintiff any duty of such a nature, that its existence would make it incumbent on this Court to impute to him all that knowledge which undoubtedly is imputed to a solicitor, who having advised a client, afterwards desires to make himself master of an estate which, by his own ignorance or want of knowledge, he has prevented his client effectually settling in that course of devolution which he intended. (a) Now with regard to Mr. *Fisher*, all fiduciary duties (unless there is a fiduciary duty annexed to the possession of the title deeds) were terminable with the

(a) See *Segrave v. Kirwan*, *Bcal.* 157. and *Bulkley v. Wilford*, 2 *Cl. & Fin.* 102.

the life of *Mary Langley*. He had been a trustee to preserve contingent remainders, and a covenantee for her benefit. She survived her husband several years, and there is not only no allegation that any thing remained to be done on that covenant, but the covenant is not even mentioned in the bill. Then there is the possession of the deeds, which, no doubt, is material. It might, as has been justly stated, have been impossible for the Plaintiff to establish his right at law without the possession of those deeds; but, after all, what was Mr. *Fisher's* duty in respect of those deeds? Was it any thing more than a duty to keep them safely, for the purpose of being delivered to the party actually entitled to the estate?

1845.

LANGLEY  
v.  
FISHER.

No case has been cited which comes near this case, in the extent to which it would carry that imputation of knowledge which is required, for the purpose of placing Mr. *George Dike Fisher* and Mr. *Prideaux* together in such circumstances, that Mr. *G. D. Fisher* could not have levied the fine, without the fraudulent intent of taking the estate away from the parties, whom he knew, at that time, to be entitled to it. I certainly do not know of any case which has proceeded to that length.

The grounds upon which it is said that there is a constructive fraud are these: — That the connexion between these parties was such, that Mr. *Prideaux* must have told Mr. *Fisher* that which it is not proved he did tell, or that Mr. *Fisher* had imposed upon him some duty, from the undertaking to perform which, the Court will impute to him such a degree and extent of knowledge upon this subject, that he could not do that, which is a common mode of effecting an assurance, without such a fraud, as would induce this

1845.  
 LANGLEY  
 v.  
 FISHER.

Court to set it aside. I have attended to this case with great anxiety, and with some sympathy for the Plaintiff who is advised that he had once a clear right, if it had been prosecuted in due time, but which has been defeated by the fine, which, he would have it supposed, he neglected to defeat, in consequence of a false representation made to him by Mr. *Prideaux*.

A case of this kind, where fraud is alleged in every page, ought to have been made out at the hearing; and I think that has not been made out. It therefore appears to me, that this bill must be dismissed, and I think it must be dismissed with costs, for this among other reasons, that there are, throughout the bill, strong allegations of personal fraud which are not proved.

Dec. 4.

DAVIDSON v. LESLIE.

On the application of Defendant's counsel, a motion stood over. When it came on again, it appeared that the Defendant had since changed his solicitor, but without order, and his counsel then appeared for him. The motion was granted on an affidavit of service.

MR. KINDERSLEY and Mr. *Walpole*, on a former day, moved for the production of papers.

Mr. *Heathfield*, who was then instructed by Mr. *Lambert* the solicitor of the Defendant, asked that the motion might stand over till the present seal, which was ordered by arrangement.

Mr. *Kindersley* and Mr. *Walpole* now renewed the motion, but stated that Mr. *Lambert* was no longer the solicitor of the Defendant, and that Mr. *Heathfield* was no longer instructed to appear.

*The*

The MASTER of the ROLLS having inquired whether there had been any order to change the solicitor (a), and having been answered in the negative, said, that the Plaintiff was entitled to the order on an affidavit of service.

1845.  
DAVIDSON  
v.  
LESLIE.

•(a) See the 18th Order of October 1842. Ord. Can. 214., and *Wright v. King*, post. 162.

CLIFTON v. BENTALL.

Nov. 19.  
Dec. 4.

CLIFTON v. BOTHAMLEY.

THE bill containing reflections on a party, it was agreed that it should be taken off the file. No answer had been filed. An order for that purpose was made on the 19th of November, but the Registrar declined drawing it up. A bill containing reflections on a party, ordered, by consent, to be taken off the file.

Mr. Pitman now applied that the order might be drawn up. He cited *Jewin v. Taylor* (a), and *Walton v. Broadbent*. (b)

The MASTER of the ROLLS.

Though it is contrary to my opinion of what is most fit to be done, I must make the order, for it has been done before, both here and in other branches of the Court. I think there is less objection in a case like the present in which no answer has been filed.

(a) 6 Bear. 120.

(b) 3 Hare, 334.



1845.

Dec. 5.

## DAVENPORT v. STAFFORD.

An order for rehearing was discharged with costs, but in the meantime the cause had been set down and briefs delivered. Held, that the costs thereof could not be included in the order, and could only be given on a rehearing or upon special application.

THIS case is reported *antè*. (a) *Edward* and *Roger Manners* (two of the Defendants) had presented a petition of rehearing, and had obtained the common order to rehear.

A motion was then made by other parties to discharge the order.

Afterwards a special petition was presented by *Edward* and *Roger Manners*, to be relieved, on the rehearing, from the admission of assets contained in the decree. The petition was dismissed with costs, and the motion was granted with costs to be paid by *Edward* and *Roger Manners*. (b) In the meantime, the cause having been set down for rehearing, briefs had been delivered and expenses incurred, which became useless.

Mr. Teed now applied to the Court, that in drawing up the order on the motion and petition, these costs might be ordered to be paid by *Edward* and *Roger Manners*.

Mr. Kindersley, *contra*.

The MASTER of the ROLLS.

It is very reasonable, but I cannot give them, except upon rehearing or upon a special application.

(a) 8 *Beavan*, 503.

(b) 8 *Beav.* p. 524.

1845.

Dec. 22.

1846.

Jan. 15.

*Ex parte* COTTON.

THE petitioner, a solicitor of this Court, having had a conference with a Queen's counsel, handed to his clerk a bank note to pay the consultation fee of two guineas, and the clerk's fee. The clerk insisted that he was entitled to a fee of 7s. 6d. and retained it against the will and the remonstrances of the petitioner, who alleged that 5s. was the proper and accustomed fee.

Fees to counsels' clerks are mere gratuities, for which they have no legal demand, and this Court has no jurisdiction in respect of such fees as against the clerks.

The petitioner brought the matter, criminally, before the magistrates at *Bow Street*, and afterwards, in the shape of a civil demand, before the Court of Requests, and subsequently before the Incorporated Law Society. Being unable to obtain the redress he sought, he presented a petition to the Master of the Rolls, stating the circumstances, and praying that the Court might make such order in the matter as it should seem meet.

The sum allowed for clerk's fees on taxation does not limit the sum which may be spontaneously given; but it does limit the sum which the solicitor can safely pay without the special direction or permission of the client.

Mr. Cotton, in person, supported his petition. He argued that counsel's clerks, as of right, were entitled to nothing; that the fee usually allowed was a mere gratuity, given or not, according to the pleasure of the client: that the amount to be allowed to the solicitor in taxation was limited by the order of the 5th of November 1840 (a), to 5s. He insisted, that, as the conduct of the clerk tended to the obstruction of the due administration of justice, this Court had jurisdiction over the matter.

The regulation of the 5th Nov. 1840, (*Ordines Can.* 157.) is not a general order of the Court, giving the clerks a legal demand for the fees therein mentioned, but a mere in-

Mr.

(a) *Ordines Can.* 157.

timation of opinion of the equity judges, that they may be properly allowed in taxation.

Petition against a clerk of counsel dismissed for want of jurisdiction, but without costs, on account of his improper conduct in the matter complained of.

1845.

*Ex parte*  
COTTON.

Mr. *Turner*, *contra*, asked the Petitioner to state precisely what order he sought to obtain on this petition.

Mr. *Cotton* intimated, that he asked a declaration that the retainer of the 7s. 6d. was unwarranted by the practice of the Court.

Mr. *Turner*. The whole contest is respecting a sum of half a crown, which the respondent has offered to return, but which the Petitioner has refused to accept, and after exhausting every adverse proceeding in the other Courts against the respondent, the Petitioner comes and parades his case here, where it must be perfectly evident he can obtain no relief. First, it is contrary to the practice to make any declaration on petition; next, the Court has no jurisdiction over this matter. Clerks of counsel are not officers of the Court, and the Court has no other jurisdiction over them than over ordinary persons. Under the order of 1840, it might be contended that 7s. 6d. was the proper fee; but that order has reference only to a taxation, and not to the relation between solicitors and counsels' clerks, with which it does not and could not interfere. It appears also, from the affidavits filed on behalf of the respondent, that 7s. 6d. is considered the proper clerk's fee, upon a conference with a Queen's counsel. The Court having no jurisdiction, the petition ought to be dismissed with costs.

The Petitioner in reply.

*The MASTER of the ROLLS*. I will not decide this case now. If I find there is no existing rule, it seems to be important, if there be jurisdiction, that a settled rule should be established which would be satisfactory to all parties; if there be no jurisdiction, authority should

should be obtained for settling this matter, in order that the rights and duties of each party may be determined. I am not aware that such fees had ever, in any way, been recognized by the Court before the regulation of 1840. This, during the argument has been called an Order, but it was really no more than an answer to a memorial of the members of the Law Institution, presented four years previously. (a) The delay in answering it occurred, not from the matter having been neglected, but because a difficulty was found in recognizing those fees at all; and if it had not been found, that the common law judges had interfered on the same subject, no such answer would have been given. It appears, from its very terms, that it is not an Order of Court: it is a mere expression of the opinion of the Judges that fees to a certain amount might be properly allowed in the taxation of costs, and it goes no further. It then became well known, that if larger sums were paid for clerk's fees, they would not be allowed in taxation.

1845.

*Ex parte*  
Cotton.

I was struck with the statement in the affidavit, that there had been an offer to return the money, and if that offer had been made on the ground of its having been retained in error, I should not have thought a formal apology necessary, and I should not have been disposed to say any thing further; but a bank note having been given to pay a certain fee, I think, that whatever claim the clerk might have had against this gentleman, he ought not to have forcibly retained the amount.

The great point of difficulty in this case is that of jurisdiction. What order can I possibly make between the petitioner and the clerk? I have no jurisdiction whatever over the latter; he is neither solicitor nor an officer of the Court:

(a) 2d Aug. 1836.

1845.

*Es parte*  
COTTON.

Court: he is merely employed by an eminent Queen's Counsel. I could make no personal order against him. If I were to act on my present impression, I should dismiss the petition on that ground; but it is important that there should be some settled rule, and, out of respect to the profession at large, I will not only consider the matter myself, but will, if necessary, communicate with the other Judges, in order to see whether some regulation cannot be made for the future.

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Jan. 15. 1846.     *The MASTER of the ROLLS.*

In this petition, Mr. *Cotton* complains, that having had a conference with a learned counsel, and being willing to pay the usual clerk's fee of 5s. on the occasion, the clerk, having money of Mr. *Cotton's* in his hands, claimed to be entitled to 7s. 6d. as his fee, and retained that sum out of the money in his hands, without the consent and against the will of Mr. *Cotton*, who, thereupon, asks me to make such order as I may think fit on the occasion.

On the hearing of this petition, it was alleged, that a counsel's clerk has no legal right to demand any fee or reward whatever from the solicitor who consults the clerk's master; that whatever is given to him is given only by way of gratuity; that the custom of the profession, according to which the gratuity is given, sanctions the gift of no more than 5s. on a conference; and that, on the taxation of costs, no greater sum would be allowed.

On the other hand, the Respondent, the clerk complained of, insists, that, on the conference, he had a right to the fee of 7s. 6d., that this Court has no jurisdiction

diction over him in respect of any act done by him as a barrister's clerk, and that, except on considering the taxation of a bill of costs, this Court has no jurisdiction over the matter in question, or to make any order on the subject; that, for the sake of preventing this litigation, he offered to return the 2s. 6d. in dispute to Mr. *Cotton*, who refused to accept it, and for these reasons, he desires to have the petition dismissed with costs.

1846.  
*Ex parte*  
*Cotton.*

Understanding that certain claims made by counsels' clerks having given rise to disputes, which have occasioned inconveniences in the communication between solicitors and counsel, it occurred to me, that perhaps this petition might afford an opportunity of putting an end to those inconveniences, and with a view to that object, I proposed, if it seemed likely to be useful, to consult the other Judges.

On further consideration, however, I think, that if it should unfortunately become necessary to make any general order on the subject, the facts of this case do not of themselves afford sufficient grounds for it, and, as it appears to me that I have no jurisdiction, either over the person or over the matter complained of, I think it right to dispose of the petition upon my own opinion, without further delay.

Having no jurisdiction, I must dismiss the petition, but, for the reasons which I am about to state, I shall dismiss it without costs.

I know of no legal ground, on which a counsel's clerk is entitled to demand, as of right, any fee or remuneration whatever from his master's clients. The custom of the profession, the desire of securing a willing attention to the business of the party, and perhaps the apprehension,

1846.

*Ex parte*  
COTTON.

apprehension, that the cheerful service which is due from the clerk to his master, would not be so well or so zealously applied to the business of the solicitor or of the party, if nothing was given to the clerk, may be reasons for clerks' fees being constantly paid, and, to some extent, being constantly allowed on taxation. I am not aware, that the clerks' fees were even so far sanctioned as to be subject to any regulation whatever, till the Judges at common law, in the year 1834, gave to the Taxing Masters, amongst other directions, a direction that the fees to be allowed to counsel's clerks should not exceed the sums therein stated. These directions are set forth in the recent edition of the General Rules and Orders of the Common Law Courts. (a)

Some time after that direction was given, the LAW SOCIETY presented a memorial to the Lord Chancellor and the other Judges of this Court, on the same subject. (b)

The memorial states, that the Taxing Officers of the common law courts had, with the approbation of the Judges, notified, that the sums therein mentioned would be allowed as gratuities to counsels' clerks; and it was prayed that such regulation, on the part of the Taxing Officers of this Court, as should seem meet, might be sanctioned.

Amongst the fees which the Taxing Officers of the common law courts had notified would be allowed as gratuities to counsels' clerks was this: — "On conference 5s.," being a fee not mentioned in the directions of the Judges, which related only to the fees between party and party.

On

(a) *Jervis' Rules*, p. 208.

(b) See 1 *Sanders' Orders*, 871.

On the consideration of that memorial, it appeared to me, that it was scarcely necessary to make an order upon a subject which was entirely under the control of the solicitors, or of the parties for whom the solicitors acted. The clerk's fees could, as I thought and still think, only be considered as gratuities, which the solicitor or party in any case might pay or not, at his option, and that although the custom of the profession had made the payment of such fees usual, if not universal, as a means of securing attention and civility, yet, as there was no legal demand, the sum payable did not require any authoritative limitation, especially as it seemed to me, that counsel always had it in their power to prevent dispute. The common law Judges had, however, thought it right to interfere, not by rule of Court, as was inaccurately stated, but by the direction to which I have referred; and upon the representation that serious inconveniences existed, and would probably be removed by an expression of opinion on the part of the Judges, an answer to the memorial, which was in the form rather of an opinion than of an order, was signed (a), and has (as I have reason to know) been very commonly acted upon: not always, indeed: for the Respondent has produced several instances to the contrary; and it is evident, that in the consideration of what may be a proper gratuity, different persons will feel and act differently, not only in the different circumstances which occur, but also by reason of entertaining different notions of liberality. I believe, however, that the sum allowed on taxation has been considered as affording the general rule for the amount of such gratuities.

1846.

  
*Ex parte*  
COTTON.

The

(a) *Ordines Can.* 157.



1846.

*Ex parte*  
COTTON.

The clerk's fees, though not legally demandable, had so far become the customary means of obtaining the attention and services of counsel, that they were, to the amount mentioned, considered as expenses fairly or not improperly incurred in the transaction of the business of the party; but the effect of the answer given to the memorial (which in the argument was inaccurately called an Order), is, not that the clerk has a legal right to demand any thing, but only that it appeared to the Judges who signed it, that the sums therein mentioned might be properly allowed in the taxation of costs.

Considering, as I do, that the Respondent had no right to any thing, except by the gift of the party, or of the solicitor on behalf of the party, I think that he erred in demanding or insisting upon any thing not voluntarily given to him: considering further, that the amount which he claimed upon the occasion, was a sum of money which he ought to have known would not be allowed on taxation, if opposed, and which the party was not bound to allow, and which, therefore, the solicitor might have to pay out of his own pocket, and, lastly, considering the improper mode in which he detained the sum, not only without the gift of the solicitor, but against his repeated remonstrances, I think that the error committed was very great, and is very much to be regretted.

It does not appear to me that his mere offer to pay, or return the excess he had improperly detained, ought, under the circumstances, to be considered as any reparation for his error: the right was not abandoned; and, although I have no jurisdiction to give any relief against him, I think that Mr. Cotton has very great reason to complain, and he comes here under circumstances, which, notwithstanding the dismissal of his petition, induce

duce me to think that he ought not to be charged with any costs.

1846.

*Ex parte*  
COTTON.

I believe that counsels' clerks are generally distinguished by honesty, fidelity, and discretion. I consider them to be a very meritorious class of men, to whom great respect is due, and I mean to say nothing inconsistent with that respect, which I think they so generally deserve; but the circumstances of this case appear to make it proper for me to state, that in my opinion, they best consult their own interest and respectability, and the highest interests of those upon whom they depend, and whom they are bound to serve, when they abstain from making claims which they cannot legally substantiate, and from raising questions which cannot be discussed without prejudice to themselves and others.

The condition in life of the clerks, and their means of livelihood, mainly, if not entirely, depend on the fees which they are allowed to receive, according to the long continued practice and custom of the profession. Under such circumstances, it may be reasonable for the clerk in every case to expect to receive the usual fee; but the fee is, in its legal character, a mere gratuity, a favour, indeed, for which attention and civility are reasonably expected in return, but for which there is no legal demand.

The sum which may be allowed on taxation does not limit the sum which may spontaneously be bestowed upon the clerk as a fee; but it does limit the sum which the solicitor can safely pay to him, without the special direction or permission of his client, and in ordinary cases it seems to me, at least, very imprudent in the counsel's clerk to indulge a hope, or so to conduct or express himself, as to indicate an expectation that he

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may

1846.      may or ought to receive a greater sum, than the solicitor  
 will, upon taxation and objection, be allowed to charge  
 against his client.

*Ex parte*  
 Cotton.

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NOTE. — “ Neither do our learned men of the law grow to good estates in the commonwealth by any illiberal means, (as envie sometimes suggesteth), but in a most ingenious and worthy manner. For the fees or rewards which they receive are not of the nature of wages or pay, or that we call salary or hire, which are indeed duties certain and grow due by contract for labour or service, but that which is given to a learned counsellor is called *honorarium* and not *merces*, being indeed a gift which giveth honour as well to the taker as to the giver: neither is it certain or contracted, for no price or rate can be set upon counsel which is unvaluable and inestimable, so as it is more or less, according to circumstances, viz. the ability of the client, the worthiness of the counsellor, the weightiness of the cause, and the custom of the country. Briefly, it is a gift of such a nature, and given and taken upon such terms, as albeit the able client may not neglect to give it without note of ingratitude, (for it is but a gratuity or token of thankfulness), yet the worthy counsellor may not demand it without doing wrong to his reputation, according to that moral rule, “ *nulla honeste accipi possunt, quæ tamen honeste peti non possunt.*” (Preface to *Sir John Davis's Reports*, p. 23.)

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1846.

*In re* FYSON.*Jan. 27.*  
*March 2.*

THIS was a petition by a mortgagor, for the taxation, after payment, of the bill of costs of the Respondents, who were the solicitors of the mortgagees. The bill, amounting to 107*l.* 5*s.*, had been incurred upon a transfer of the mortgage, and had been paid by the petitioner's solicitor, without any objection, on the 24th of *January* 1845. On that occasion, the draft bill of costs had been produced, and a promise was made that a fair copy should be delivered on the following day: this, however, was not done until the 9th of *April*, when objections were made to the items. The petition was presented within twelve months, and amongst the alleged items of overcharge specified in the petition were 5*l.* 5*s.* for "numerous attendances," 12*l.* 12*s.* for abstracts of the mortgage deeds, and a charge of 7*l.* for an attested copy of the deed of transfer to be kept by the mortgagee. There were other specified items to a very considerable amount in the whole.

Mr. *Turner*, in support of the petition, argued, that as a mere draft copy of the bill of costs had been delivered on the 24th of *January*, the petitioner had had no opportunity of examining the items, and that, therefore, the bill had been paid, under such circumstances as not to preclude the right of moderating it upon taxation.

Secondly; that the items complained of, which he commented on at length, could not be supported, and afforded a sufficient ground for directing the taxation of the bill.

Mr. *Kindersley* and Mr. *Kinglake*, *contra*, insisted, first, that in this case there had been no pressure, and

The single fact that, upon a transfer of a mortgage, a mere draft bill of costs of the mortgagee's solicitor is, for the first time, produced and then paid, is not of itself, without proof of pressure or fraud, a sufficient "special circumstance" to authorize taxation after payment, nor is that fact sufficient, coupled with overcharges which are not so gross as to evidence fraud.

The taxation (under the 6 & 7 *Vict.* c. 73.) of a solicitor's bill at the instance of a third party "liable to pay" is regulated by the relations existing between the solicitor and his client, and not as between the solicitor and such third party.

1846.

*In re*  
FYSON.

that the payment had been voluntary; secondly, that the items were such as could be maintained as against the mortgagees, who alone were the clients of the solicitor; and even if there were overcharges, they were not so gross as to be evidence of fraud. That, therefore, sufficient "special circumstances" did not exist to warrant the taxation of a bill, after payment without pressure or protest.

Mr. *Turner*, in reply.

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*The MASTER of the ROLLS.*

If I were to make an order according to the prayer of the petition, no solicitor would ever be protected after payment of his bill.

This petition is presented by a mortgagor for the taxation of the bill of costs of the mortgagees' solicitor. The late act of parliament (*a*) allows such a taxation, and it has been carried into practical operation with great effect. It is of great importance that this jurisdiction should be well maintained, but of equal importance that it should be well exercised; for considerable mistakes have been made in respect to this clause, which, if not corrected by decisions, would lead to great inconvenience.

Here the bill has been paid, but this settlement will not stand, if there be such overcharges in the bill as to amount to fraud. After payment, the questions are,—what is the amount of overcharge, and what were the circumstances under which the bill was paid? In this case, the mortgagor gave notice to pay off the mortgage money on the 1st of *July*. The day arrived, the mortgagees

(*a*) 6 & 7 *Vict.* c. 73.

mortgagees had made arrangements for lending out the money again, and in that respect had placed themselves under some liability; and, therefore, it was of importance to have the business then completed. The money was paid on the 24th of *January*; and it has been admitted, and very properly so, that there was not the least oppression practised. The draft bill of costs was produced, and a copy was promised. That was fair and proper; and there is nothing to shew that the bill was to be subject to any further examination. The payment of the bill upon production of the draft, without any previous delivery of the bill itself, is not alone such a special circumstance as will induce the Court to order taxation after payment.

1846.

*In re*  
Fyson.

Then comes the question, is there a sufficient amount of overcharge made out here? First, it is to be observed, that the petitioner has fallen into a mistake, which has been of very frequent occurrence; mortgagors think, that where they call for a taxation of a mortgagee's solicitor's bill, they have a right to alter the relation of solicitor and client, and are not bound to pay more than the mortgagees could establish as against them, the mortgagors. There is nothing in the act of parliament which warrants this notion, and it is not so. The bill may be taxed at the instance of the mortgagor, who is liable to pay it; but it is the bill between the mortgagee and his solicitor; and the mortgagor desiring to tax it, must do it on the condition of paying what is due to the solicitor from his client the mortgagee, which possibly may be more than the mortgagee, if he had paid it, could have recovered over from the mortgagor. The mortgagor asking taxation against the solicitor, has merely the right to tax the bill as between the solicitor and his client the mortgagee. It is attempted to sustain the petition on the ground of gross overcharge. Now I am not prepared to say that all these items could be maintained on a tax-

1846.

*In re*  
FYSON.

ation : it is not necessary to come to such a conclusion ; but I am clearly of opinion, that there is no such gross overcharge proved, as to induce me to say, that there ought to be a taxation after payment in the absence of any other special circumstance.

There is, then, no case of pressure at the time of the payment, and no such items of overcharge as to evidence fraud ; in other words, there are no such "special circumstances" as to induce me to order the taxation of this bill of costs. For these reasons, the petition must be dismissed with costs.

1845.  
Nov. 18.

LANCASHIRE *v.* LANCASHIRE.

A Receiver will not be appointed where the rights, as between the Plaintiff and Defendant, are doubtful, if the Defendant has obtained the legal estate without fraud, and no case of danger as to his security is alleged.

The Plaintiff sued as heir, and the answer neither admitted nor denied that he held that character : held, that this alone was not a sufficient ground for refusing a Receiver.

THE testator *John Lancashire*, by his will, dated the 26th day of *March* 1816, gave to his brother *William Lancashire* a sum of 8700*l.* ; and he directed that when his daughter *Sarah Lancashire* should attain her age of twenty-one years, or sooner if he should think proper, he should lay out the sum of 8700*l.*, and the interest which should have accumulated thereon, in the purchase of freehold lands, and cause the same to be conveyed to his daughter for life, with remainder to trustees to preserve contingent remainders, with remainder to her issue in tail general, and in default of such issue to his brother *William Lancashire* in fee.

The testator died soon afterwards, leaving *William Lancashire* (his brother trustee and executor), *Ann Lancashire* (his widow), and *Sarah Lancashire* (his only child and heir-at-law), him surviving. *William Lancashire* proved the will, and in part executed the trust.

*William*

*William Lancashire* (being thus entitled in fee-simple, in remainder expectant upon the decease of *Sarah Lancashire* without issue, to the estate to be purchased with the 8700*l.*,) made his will, dated the 16th of *April* 1830, and he thereby devised a certain real estate to *Ann Lancashire* in fee. And he gave the residue of his real and personal estate to the Defendants *Hutchinson* and *Ann Lancashire*, upon trust to apply the income in the maintenance &c. of his niece, *Sarah Lancashire*, until she attained twenty-one, or married with consent; “and immediately upon the happening of either of the said events, upon trust to convey, assign, and settle all the said trust estates, monies, and premises, and the accumulations thereof (if any), or such part or parts of the same as they should think proper, to the use or for the benefit of *Sarah Lancashire* for life,” with remainder to her children, and in default, “then to the use or for the benefit of the said *Ann Lancashire*, her heirs, executors, administrators, and assigns absolutely; and as to such part or parts of the said trust estate, monies, and premises, which his said trustees should not think proper to settle, as aforesaid, and with respect to which he gave them *an absolute discretion*, upon trust, to convey, assign, and transfer, the same, unto his said niece *Sarah Lancashire*, her heirs, executors, administrators, and assigns absolutely.”

1845.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

The testator also directed certain usual powers to be contained in the settlement, and that, to prevent dispute, it should be submitted to and approved by some barrister of ten years' standing, and should then be final, binding, and conclusive on all persons; and should not afterwards be, in any way, altered or questioned. The will also contained a power for the acting trustee, “with the consent of the person or persons for the time being beneficially entitled to the said premises,” to appoint  
 new



1845.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

new trustees, in the place of a trustee dying, or declining to act.

By a codicil, dated the 12th of *June* 1830, the testator postponed the time of making the settlement directed by the will, till *Sarah Lancashire* should attain the age of twenty-five years.

*William Lancashire* died in *January* 1831, and his will was proved by *Hutchinson* and *Ann Lancashire*.

By an indenture, dated the 10th of *December* 1831, the Defendant *Osborne* was substituted as a trustee in the place of *Hutchinson*.

In the years 1834 and 1836, estates called *Alverston* and *Kirby Bellars* were purchased with part of the legacy of 8700*l.*, but no settlement was made of them.

In *May* 1840, *Sarah* attained twenty-five, and possession was delivered to her of the real and personal estate. She died intestate and unmarried in *July* 1842, and at her death no settlement had been made of the property. Her mother *Ann Lancashire* took out administration and entered into possession of the estates.

The Plaintiff *George Lancashire* claimed to be the heir-at-law of *Sarah*, and also of the testators *John* and *William*, and as such, insisted, that as no settlement had been executed in pursuance of the will of *William Lancashire*, he was entitled to the real estate purchased out of the sum of 8700*l.*, and to the residue of that sum remaining uninvested.

In *September* 1842, negotiations were entered into between the Plaintiff and the Defendant *Ann Lancashire*,

shire, through their solicitors, in relation to the claim of the former, the Defendant holding out that she was open to an amicable adjustment, without the tedious and expensive interference of the Court of Chancery, if the Plaintiff could establish any right.

1845.  
LANCASHIRE  
v.  
LANCASHIRE.

On the 4th of *October* 1842, the Plaintiff furnished his pedigree, which underwent some investigation at a meeting on the 9th of *November*; but, on the 19th of *December*, the pedigree was returned, with a statement, that the trustees of the will of *William Lancashire* had executed a settlement of the estates.

It turned out, that, pending the negotiations, a deed, bearing date the 1st of *November* 1842, was executed by *Ann Lancashire, Osborne, and John Hutchinson*; by which the trust property devised by the wills of *John Lancashire* and *William Lancashire*, on trust to be conveyed and settled for the benefit of *Sarah Lancashire* with such remainders as before stated, was conveyed and assigned to *Cantrell and Osborne*, in trust for the benefit of *Ann Lancashire* absolutely. The deed, though bearing date the 1st of *November*, was not, in fact, executed by *Hutchinson* until the 16th of *December*, and its existence was first stated to the Plaintiff on the 19th.

By this bill, filed on the 29th of *May* 1844, the Plaintiff insisted that he, as heir-at-law of *Sarah, John, and William Lancashire*, was entitled to the estates comprised in the trusts of the two wills. He prayed to have the deed of *November* 1842 delivered up to be cancelled, and for all such relief as he was entitled to as such heir.

By her answer, the Defendant *Ann Lancashire* did not deny, but said she did not know, and could not set forth

1845.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

forth as to her belief, or otherwise, whether *Sarah Lancashire* the daughter of *John Lancashire* did leave the Plaintiff her heir-at-law her surviving, or how the contrary was to be made out, or who was such heir-at-law, or whether the Plaintiff was also the heir-at-law of *John Lancashire* and *William Lancashire*, or either of them, or who was such heir-at-law; but she insisted, that the Plaintiff was not, as heir or otherwise, entitled to the trust premises in question. She also alleged, that the power given to her and *Hutchinson* by the will of *William Lancashire*, to convey, assign and settle the trust estate, monies and premises, as therein mentioned, was a subsisting power, notwithstanding the death of *Sarah Lancashire*. She said that, being so advised, the deed of the 1st of *November* 1842 was executed accordingly.

A motion was now made, on behalf of the Plaintiff, for a Receiver of the rents and profits of the estates at *Alverston* and *Kirby Bellars*.

Mr. *Turner* and Mr. *E. Webster* in support of the motion. The heir-at-law has a clear title to the property until the Defendant has established the validity of the deed of 1842, which is disputed. There being a *prima facie* title in the heir, the Court ought to appoint an indifferent person to secure the rents pending the litigation. It is not denied that the Plaintiff fills the character of heir: the Defendant merely professes to be ignorant of the fact. Upon searching the Registrar's book, such appears to have been the case in *Sitwell v. Wilkins (a)*, where the Defendant stated his ignorance of the title of the Plaintiff, yet Lord *Eldon* appointed a Receiver.

The settlement was not a due execution of the power. It is plain, from the fact that *Sarah* was put into the absolute

(a) *Jacob*, 280.

*absolute* possession of the whole property on her attaining *twenty-five*, that no intention existed of settling it, and *th*at the power was abandoned, and the discretion *executed*. Again, *Osborne* was never duly appointed trustee, by reason of the party whose consent was *necessary* being a minor, and the concurrence of *Hutchinson*, eleven years after he had retired from the trust, gave no validity to the deed of 1842, the more so, as he refused to execute it, except under an indemnity.

1845.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

If the Plaintiff, instead of entering into a correspondence with the Defendant, had filed his bill before the execution of the deed of 1842, the Court would have appointed a Receiver, who would not have been discharged upon the execution of the deed, for no sanction would have been given to any alteration of the rights of the parties *pendente lite*.

They commented on the *mala fides* of the Defendant, in procuring the execution of the deed pending the negotiations, and on certain misrepresentations as to the time at which the deed had been executed.

Mr. Kindersley and Mr. Rolt, *contra*, for *Ann Lancashire*. It is a common experiment for a party to attempt, upon an interlocutory application for a Receiver, to obtain from the Court an opinion on the merits of a case, in order to effect a compromise; but the Court always carefully abstains from expressing any such opinion *(a)*, except at the hearing, and therefore it would be improper, on behalf of the Defendant, to enter into that question farther than is absolutely necessary.

However,

(a) See *The Skippers' Company v. The Irish Society*, 1 *Myl. & Cr.* 162.

1845.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

However, to entitle the Plaintiff to a Receiver, he must make out, first, that he is heir-at-law, otherwise he has no *locus standi*. This is like the case of *Dubless v. Flint (a)*, where an application was made by the Plaintiff, suing as heir-at-law for payment of money into Court, and the Defendant by his answer said, he did not know &c. whether the Plaintiff was heir-at-law. Lord *Cottenham* refused the application on the ground of there not having been a sufficient admission of the Plaintiff's title. Such is the case here, for any thing that appears the Plaintiff is a stranger to the parties under whom he claims.

Secondly, even supposing the Plaintiff to be heir, he must still make out that the instrument of 1842 is such that it cannot stand in equity. If the testator thought fit to intrust the Defendant, as an object to be benefited, with the discretion, she was perfectly justified and right in executing it. Had she abstained, her rights might have been destroyed, and the question could never have been tried unless there had been an execution. Even where a party executes a power of appointment, and thereby defeats a judgment against him affecting his estate, the Court does not consider it a fraud. (b)

The Defendant has the legal estate, obtained without fraud, and it is "an extreme case" where the Court takes the possession from a party having the legal estate: *Lloyd v. Passingham (c)*, in which case Lord *Eldon* said:—"The Court interposes, by appointing a Receiver against the legal title, with reluctance, compelled by judicial necessity, the effect of fraud clearly proved, and imminent danger." All these circumstances are wanting in the present

(a) 4 *Myl. & Cr.* 502.

(c) 16 *Ves.* p. 70.

(b) *Skeeles v. Shearly*, 3 *Myl. & Cr.* 112.

present case, for there has been no fraud practised, and no danger or insolvency is even alleged.

1845.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

There has been no *mala fides* on the part of the Defendant; she was justified in taking every step necessary for her own security, and nothing she has done can affect the Plaintiff's right if she had not the power of doing it.

*The MASTER of the ROLLS.*

It is of great importance to determine in what cases the Court will grant a Receiver. Here, the Defendant has the legal estate, and she also claims to be the equitable owner, in the absence of fraud and contrivance.

I confess I should have overcome any difficulty arising from the circumstance that the title of the Plaintiff, as heir, is not sufficiently admitted by the answer. But there are the questions, whether there is a sufficient degree of presumption in favour of the Plaintiff's title, and whether the Court ought to interfere on the ground of danger, or of any fraud practised by the Defendant, in obtaining the legal estate, after a claim had been made by the Plaintiff.

It is to be observed, that when *Sarah* attained the age of twenty-five years, the personal estate was given to her absolutely, and, by that gift, became freed from all the trusts of this settlement. She was also put into possession of the real estate; but unless an absolute gift of the real estate is to be implied from the absolute gift of the personal estate, there is nothing material in the fact of possession of the real estate having been given to her, because she was entitled to that possession, whether the property was settled or not. Her being  
 put

1845.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

put into possession of the real estate, does not, *primâ facie*, seem to afford any thing like a presumption that no settlement was in contemplation. However, the fact that nearly two years elapsed without any settlement having been made, does afford some presumption that they did not intend to do it; but it is not conclusive.

In this state of things, and in the month of *July* 1842, *Sarah* died unmarried, and upon her death, such interest as vested in her in fee, of course, descended to her heir-at-law. The Plaintiff claims to be heir-at-law, and if such be the case, he will be entitled to any right which can be acquired in that capacity. On the other side, the Defendant says, “no, you do not get an indefeasible interest as heir-at-law, for the estate was vested in trustees, who had a discretionary power to make a settlement and you can only claim, on the ground that that discretion was not exercised, and cannot now be legally exercised.” It is alleged, on the part of *Ann Lancashire*, who is entitled to the remainder under any settlement, that the settlement might be made at any time, and that, although *Sarah* is dead, and has left no issue, still that she, *Ann Lancashire*, who is entitled in remainder, provided that a settlement was made, is entitled to take advantage of the discretion given to her as a trustee, and exercise it by making a settlement, and then to enjoy the benefit under it. Whether this is right or not, is the question to be determined in the cause.

I quite agree, that if the Plaintiff, having a vested interest subject to power, had filed a bill before that settlement of the 1st of *November* 1842 had been executed, and, upon a motion for a Receiver, the Defendant had said “I claim a right to give myself the legal estate,” the Court, under such circumstances, would have appointed a Receiver; and I think it extremely probable,  
 that

that the Receiver having been once appointed, would not, upon the Defendant's exercising the discretion in her favour, have been discharged. I cannot, however, agree, that it is the same thing in the present case, because here the deed was executed before the suit had been instituted. It was done under circumstances which may or may not be right; I do not feel quite satisfied about it.

1845.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

It seems a strange thing that the Plaintiff (who as heir-at-law was claiming the whole estate, against a person in possession, who, as he alleges, had, and was known to have, no right whatever), should have proposed any compromise to take a part, she, being according to his statement, clearly entitled to nothing; but if the Defendant was known to have the power of creating for herself a legal right under the discretionary power, then I do not think the offer of a compromise at all singular. If that were the real state of the case (which I have not the means of knowing, though it has been so represented), then I do not think the course of proceeding adopted by the Defendant was so objectionable as it would at first appear. On the other hand, if she had no right at all, and the claim being made upon her by the heir to deliver up the estate, she drew him into an explanation of his title as heir, without informing him that she was adversely claiming the property, then, although I cannot say that it amounts exactly to a fraud, still it is a course of proceeding which cannot be very well approved of. The question, however, is, whether, under the circumstances, there being a doubtful right between these parties, and the Defendant having obtained the legal estate without fraud, and there being no danger alleged as to the security for the rents and profits, I ought to grant a Receiver: and, upon the whole, I am of opinion that I ought not.



1845.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

The only order I can make is, as to the production of the books and papers as agreed. It is the common course that where a party asks for something he is entitled to, and also for something that he is not entitled to, he pays the costs of the motion, though it succeeds.

I do not think that this is a case altogether of that sort, and, therefore, the costs of this motion must be costs in the cause.

Feb. 25.  
 Nov. 25. 26.

#### BUTTERWORTH v. HARVEY.

A testator gave his real and personal estate, after paying four annuities, to one for life, and after his death, he directed his personal, and the produce of his real, estate to be divided amongst the children of A. living at the testator's death, when the youngest attained twenty-one, if the annuitants should be then dead; but if not, then his trustees were either to invest it and pay and apply the residue of the income in the maintenance &c. of the children, according to their discretion, or accumulate, such accumulations to be paid, after the death of the surviving annuitants, with the original shares. There was a gift over in the event of the death of any child who should become entitled to a distributive share before his share became "payable." One of the children predeceased an annuitant. Held, nevertheless, that the bequest was vested, and that the gift over did not take effect.

**T**HE testator, by his will, after giving four annuities for life, devised and bequeathed his real and personal estate to trustees, upon trust, after payment of the annuities, to pay the income to his brother for life, and, after his decease, to sell his real estate, for the benefit of the persons interested therein; and to divide the monies to arise by such sale or sales, and the residue of his personal estate and effects, "unto and amongst all and every the children of *Mary Harvey*, as should be living at the time of the testator's decease, share and share alike, when the youngest of such children should have attained his or her age of twenty-one years," if the annuitants should be then dead; but if the annuitants survived the tenant for life, then to invest

invest the purchase monies, and to pay and apply the residue of the income of the whole estate, for and towards the maintenance, education, and advancement in the world of the children of *Mary Harvey* as aforesaid, in such manner, and in such proportions, as the trustees should think most fit for the benefit of the said children, or otherwise to accumulate, as the trustees should deem it most to their advantage; such accumulations to be paid or transferred, from and after the decease of the survivor of the annuitants, to the said children of *Mary Harvey* as should be living at the time of the testator's decease, share and share alike, together with their original shares of the said principal monies to arise from the sale of his real estates, and the residue of his personal estate and effects.

1845.  
  
 BUTTER-  
 WORTH  
 v.  
 HARVEY.

The will then proceeded to provide, "that in case any or either of the children of *Mary Harvey*, who should become entitled to a distributive share of the said monies, according to the intent and meaning of that his will, should depart this life before the same should become payable, leaving issue lawfully begotten, then he gave and bequeathed the share or shares of him, her, or them so dying leaving issue, unto his or their child (if but one), or children (if more than one), in equal shares and proportions; nevertheless, such last-mentioned child or children to take only the share his, her, or their father or mother would have been entitled to, if living."

And in case any or either of the children of *Mary Harvey* should depart this life, before his, her, or their distributive share of the said monies should become payable, without leaving issue as aforesaid, then he gave and bequeathed the share of him, her, or them so dying without issue, unto the survivor or survivors of them.

1845.  
  
 BUTTER-  
 WORTH  
 v.  
 HARVEY.

The testator died in 1811, the tenant for life died in *July* 1825, and the last annuitant died in *May* 1843.

*Martha*, the youngest of the children, attained twenty-one, and upon her marriage, her share was settled so as to give a life interest to her husband *Mr. Roberts*. *Martha* died in *January* 1843, in the lifetime of the surviving annuitant, leaving one child. The question was, whether the share of *Martha* belonged to her child; or was subject to the trusts of the settlement, under which her husband was entitled to a life interest. It was admitted, during the argument, that the annuities did not exhaust the whole income.

*Mr. Turner* and *Mr. Cockerell*, for the trustees.

*Mr. Rolt* for *Mr. Roberts*, the husband. *Martha* took a vested interest, and it was validly settled on her marriage, so as to give her husband a life interest. The question depends on the construction of the word "payable," which is ambiguous. It has reference to the legatees attaining twenty-one, and not to the death of the annuitants. The cases authorize this construction. In *Hallifax v. Wilson* (a) a testator gave a life estate in the residue to his mother, and after her decease, upon trust to pay and transfer it to his four nephews, their shares to be paid at twenty-one; with a gift over in case of any of their deaths before their shares became payable. A nephew attained twenty-one, and died in the life of the tenant for life, and it was held that the word "payable" referred to the majority, and not to the period of distribution. So in a very recent case of *Jones v. Jones*. (b) "A testator bequeathed 10,000*l.* in

(a) 16 *Fes.* 168.

(b) 13 *Sim.* 561.

in trust for his son *J. L. J.* for life, remainder in trust for the children of *J. L. J.*, when and as they should attain twenty-one, as tenants in common, and, if any of them should die before their shares became payable, leaving issue, their shares to be paid to their issue; but if any of them should die before their shares became payable, leaving no issue, their shares to be paid to the survivors at the same time as their original shares should become payable; and, if *J. L. J.* should have no child, or, having such, they should all die under age and without issue, then the trust fund to sink into the residue, which the testator gave to two of his other children. *J. L. J.* had four children, all of whom attained twenty-one; one of them died, in his lifetime, without issue. It was held, that 'payable' meant 'attain twenty-one,' and, consequently, that one-fourth of the fund vested in the deceased child."

1845.  
BUTTER-  
WORTH  
v.  
HARVEY.

The present case is placed beyond all doubt, by the provision for *payment* for the "maintenance, education, and advancement in the world," during the lives of the annuitants.

The word "payable," therefore, refers to the majority of the legatee, and not to the period of distribution. (a)

Mr. *W. W. Cooper*, for the child of *Martha*. *Martha*, having died in the life of the annuitants, did not take a vested interest. There is no substantive gift to the children of *Mary Harvey*, except in the direction to divide and pay; therefore the period of vesting was the time of payment, or the death of the surviving annuitant. Secondly, there is an express gift over to the

(a) 2 *Jarman on Wills*, 701.

1845.  
BUTTER-  
WORTH  
v.  
HARVEY.

the children of any child of *Mary Harvey* who should die before her distributive share became *payable*.

[*The MASTER of the ROLLS*. The annuities did not exhaust the whole, and the trustees were authorized before the deaths of the annuitants to divide the surplus amongst the children of *Mary Harvey*.]

In that view, the property might vest at different times, as in *Gaskell v. Harman* (a), where it was held that it vested only as it was received. He also cited *Willis v. Plaskett* (b) and *Ruffell v. Norman*. (c)

Mr. Hood, for other parties.

Mr. Rolt, in reply.

*The MASTER of the ROLLS*. I will look at the will, and give my opinion to-morrow.

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Nov. 25.

*The MASTER of the ROLLS* held, that the husband was entitled to a life interest.

(a) 6 *Ves.* 159.

(b) 4 *Beav.* 208.

(c) *V. C. E.* July 24. 1844.

1846.

## SKIPWORTH v. SKIPWORTH.

Jan. 17.

**T**HE Plaintiffs were the parties beneficially interested under the will of the testator of which the Defendants were trustees. By the decree, certain accounts were decreed to be taken before the Master, and difficulties having arisen in taking the account of the profits made by the Defendants on the testator's farm, the point was, by agreement between the parties, referred to arbitration.

Upon the face of an award, the arbitrator appeared to have improperly disallowed a sum of 818*l.* On an application to a Court of Equity to set aside the award, the Respondent offered to allow it. Held, nevertheless, that the award must be set aside.

The arbitrators by their award, made in *August* 1843, awarded for profits a sum of 818*l.* beyond 2574*l.* which had been accounted for by the Defendants in their answer, and making an aggregate of 3392*l.*, and a charge, upon the footing of this award, having been brought in, was allowed by the Master.

Further difficulties arose on the *queried* items of other parts of the accounts, and the parties again agreed to refer their differences to Mr. *Pugh*. Accordingly, by an agreement dated in *August* 1845, made between the parties, reciting that it had been ascertained, in the prosecution of the said decree, that the Defendants, in the carrying on and management of the farm and farming business of the testator, from the time of his death to the month of *May* 1832, had made profits to the amount of 3392*l.* 14*s.*, as the Defendants did thereby acknowledge, and also reciting that the accounts of the personal estate, of the rents and profits of the real estates, and of the maintenance and education of the testator's children, had not then been taken, or the balance due

1846.  
  
 SKIPWORTH  
 v.  
 SKIPWORTH.

from *Thomas Skipworth* in respect thereof ascertained, it was agreed by the parties thereto, that they would abide by, observe, perform, and keep the award, order, and determination of Mr. *Pugh*, of and concerning the accounts of the Defendants, of the personal estate of the testator, and the rents and profits and proceeds of his real and copyhold estates, and the money expended in the maintenance and education of the infant children of the testator; and the profits and produce of the farm and farming business carried on by the Defendants, so far, and so far only, as the said profits and produce had not then already been ascertained, and of and concerning all matters whatsoever in difference between the Plaintiffs and the Defendants, relating to, or at all concerning the same accounts, or arising out of the same.

And it was thereby agreed, that the said arbitrator should have full power to decide all matters in difference between them touching the said accounts.

The arbitrator, by his award dated in *November 1845*, found a balance of 1197*l.* due from the Defendants; and he stated, "that on taking the said accounts, he had not charged the said *Thomas Skipworth* with the sum of 818*l.*, alleged to be the amount of gains and profits which the farm ought to have yielded, more than were accounted for, as stated in the first award."

The Plaintiffs presented a petition, praying that the award might be set aside on several grounds, and amongst them, on the ground of the exclusion of the 818*l.* from the account.

Mr. *Turner* and Mr. *J. H. Taylor*, in support of the petition, relied on the rejection by the arbitrator of the sum of 818*l.*, which, by agreement between the parties,  
 was

was an admitted item, as invalidating the award. They also raised other objections to the award; but as the Court did not come to any conclusion on them, it is unnecessary to state them.

1846.  
  
 SKIPWORTH  
 v.  
 SKIPWORTH.

Mr. Kindersley and Mr. Sidebottom, *contra*, argued, that the award was valid, that the whole matters of dispute having been referred to the arbitrator, nothing having been definitively settled by the Master, who, until making his report, might have received new charges and evidence on every item. They said, however, that they were not desirous that the 818*l.* should be excluded from the account, and that the Court might separate that, which, upon the face of the award, appeared valid, from that which was invalid, and thus set the matter right, without remitting the parties to the jurisdiction of the Master: *Knox v. Symmonds (a)* was cited.

*The MASTER of the ROLLS.*

If it had not been for the sum of 818*l.*, I should have had considerable difficulty in agreeing with any one of the petitioners' propositions, with a view of founding an order upon them; but with respect to that sum I do not see any way of escaping from the objection to the award.

Several matters of account appear to have been depending between the Plaintiffs and the Defendants; first, the account relating to the personal estate; next, the account relating to the rents, profits, and produce of the real estate; then the account of the farming profits; and, lastly, the account of the monies applied for the maintenance and education of some of the infants. These accounts had proceeded a long way in the Master's

(a) 1 *Ves. jun.* 369.



1846.  
SKIPWORTH  
v.  
SKIPWORTH.

ter's office. The charges had been, as in all such cases they must be, provisionally allowed. With respect to the farming profits, it is necessary to observe, that the charge allowed consisted partly of that which appeared in the answer of the Defendants, and partly of a sum of money which had been found upon a former reference to arbitration. I may observe, that parties often act very wisely, when they refer a litigated point to the arbitration of some disinterested individual, who may settle it between them, without all the formalities, delays, and expenses of a formal litigation. That sum of 818*l.*, thus found to be part of the profits, was included in the amount of the profits allowed by the Master, that is to say, allowed provisionally, for I have heard nothing in the course of this argument to induce me to think that the Master, having the matter wholly under his control, was not still at liberty to receive fresh charges, and amended discharges, if circumstances had been brought before him, such as to make it proper for him to do so.

I do not find any thing in the terms of this agreement which precluded the arbitrator from entering into the consideration of any matter which had not been finally concluded and agreed on between the parties themselves; nor do I think that a matter thus allowed by the Master without the word "provisionally" attached to the finding or allowance is to be considered as finally concluded between them. It is not upon the notion, therefore, of any finding or allowance by the Master that I have felt a difficulty in this case. It is this: that when the parties agreed to make this particular reference, they did, at the same time, agree and admit, that the amount of the farming profits was ascertained to be a particular sum: and that was acknowledged quite independently of the Master's finding, or of the allowance on the former arbitration,

arbitration, with which I have nothing to do on this occasion. The parties did agree that that was the amount of that particular item in the accounts. Those profits were to be taken into consideration, and so far as they had been ascertained, amounted to this particular sum. Now those words in the agreement, "so far as they had not then been ascertained," do, no doubt, imply, that there might be some further investigation as to profits, but it could not be to alter that sum otherwise than by some other sums which might have had to be considered in relation to that particular matter, and there could be no investigation to alter the account which shewed that result. If you have a certain amount of profits agreed on as the result of your account, you cannot touch the items of the account, because you cannot do so without altering that conclusion. I conceive, therefore, that the parties agreed on the particular items from which that sum resulted as settled between them, although the final amount of profits, which on the further investigation might appear to be due, was not considered as completely settled.

1846.  
  
 SKIPWORTH  
 v.  
 SKIPWORTH.

The arbitrator had power to award, order, and determine between the parties: he considered that one of the things which he had to do was to ascertain the balance due; and, accordingly, he proceeded towards that end, and he found that there was a particular sum due. It does not end there; if it did, the argument would have great weight; but he goes on and expressly states, that he has excluded that 818*l.*, "the alleged profits." So that he throws a doubt on that. It is clear that this 818*l.* was a defined portion of that sum of 3392*l.* which had been ascertained to be profits and acknowledged to be such. As to this sum, which, according to the agreement between the parties, was an ascertained settled item in the account, this gentleman, not considering it

to

1846.  
  
 SKIPWORTH  
 v.  
 SKIPWORTH.

to be profits, and made out to be profits, and no regard to the admission between the parties, & has omitted this 818*L*, "the alleged profits," and found, upon the award, on taking the account, certain sum is due. Mr. *Kindersley* has offered great fairness, to allow that sum of 818*L*. I very much wish that some arrangement may be made, by these parties may have the benefit so far as to that which I cannot help thinking has been conducted reference; but it is not, for that reason, consistent with my duty to pass over what I consider a considerable mistake.

I must on this ground take away the force of the award, which must be set aside.

Award set aside.

Jan. 20.

### TREVELYAN v. CHARTER.

A direction for the Master to settle a conveyance omitted in a decree was supplied by petition.

A secret purchase by an agent from his principal was set aside.

By the decree, possession was directed to be given and a conveyance executed. Accounts were also directed to be taken of the rents and purchases, and the balance was directed to be paid, but no lien was given. Held, the conveyance must at once be made without waiting for the result of the accounts.

THIS bill was filed to set aside a purchase by an agent from his principal, covertly in the name of another person, at an under value. (a) The decree made in 1835, the sale was declared fraudulent and was set aside, and the Plaintiff undertaking to confirm the sales of the premises which had been purchased.

(a) See *Charter v. Trevelyan*, 11 Cl. & Fin. 714.

previously to filing the bill, it was referred to the Master to inquire and state to the Court what parts of the said premises had been so sold by *Thomas Charter* and the Defendant, respectively, and when, and to whom, and for what sums such premises were respectively sold. And it was ordered, that the said Defendant should re-convey to the Plaintiff, or as he should appoint, all such parts of the said premises as had not been sold, disposed of, and conveyed to other persons by *Thomas Charter* deceased and the Defendant; and deliver up the possession thereof. And it was referred to the Master to take an account of the rents &c., from the date of the fraudulent purchase, and of the purchase money of the parts since sold, and to compute interest thereon, and also an account of the purchase money paid by *Charter*, and of monies expended by him in substantial repairs and lasting improvements, and he was to calculate interest thereon, and to deduct the two amounts, and either party was to pay the other what should be found due on taking such account.

1846.  
TREVELYAN  
v.  
CHARTER.

By an order made on the 12th of *November* 1835, the Defendant was ordered to deliver up to the Plaintiff the hereditaments &c. not sold or conveyed.

The account under the decree had not yet been taken. A conveyance had been prepared in the Master's office; but it was found that there was no direction in the decree for the Master to settle it. The Defendant declined to execute it, until the result of the account was known, and the lien, which he alleged he had on the estate, had been satisfied.

A petition was presented by the Plaintiff, praying that the Defendant might execute the conveyance, or that it might be referred to the Master to settle a proper conveyance, and that the same might be duly executed.

Mr.

1846.  
  
 TREVELLYAN  
 v.  
 CHARTER.

Mr. *Turner* and Mr. *Walpole*, in support of the petition. The decree orders the Defendant to deliver up possession of the estates, and a conveyance of them is directed to be made, quite independent of the account. No lien is given by the decree.

Mr. *F. H. Goldsmid*, *contrà*. The Defendants are not bound to convey, until the result of the accounts is known; for the Court could never have intended to take the property from the Defendants, until they had been repaid the purchase money, for which they have a lien.

This is an application by petition to vary a decree: that is not the proper office of a petition.

*The MASTER of the ROLLS* (without hearing a reply) said: The decree provides for the conveyance and delivering up of the estate independently of any thing else. The intention must, therefore, have been, that the Plaintiff should recover back his property and the title thereto without any delay. If the Defendant has any lien, he ought to make it available by some distinct proceeding of his own. He cannot have it in this suit.

The decree omitted to give authority to the Master to settle the conveyance, and the Master having proceeded in the matter without authority, one of the parties suddenly breaks off and says, he is not bound to execute it. I am of opinion that it must be referred to the Master, as prayed.

If I thought there was any doubt as to what estates were to be conveyed, I might pause; but there cannot be any, as the Court in 1835 directed possession of these very estates to be delivered up, and the Master has already, though without authority, prepared a conveyance of them in the presence of both parties.

1846.

## BRITTEN v. BRITTEN.

Jan. 21.

UPON an application for payment out of Court of money belonging to a married woman, the affidavit went simply to shew that the fund in question was not settled.

Mr. *Kindersley*, in support of the petition.

*The MASTER of the ROLLS.*

Upon an application for payment out of Court of money belonging to a feme covert, it should be shewn either that there was no settlement, or what the settlement was; if there was a settlement, an affidavit that it does not affect the fund is not sufficient, as the judgment and belief of the parties as to its effect cannot be relied on. (a)

When payment out of Court is asked of money belonging to a married woman, an affidavit that the fund is not settled is insufficient. It must be shewn either that there is no settlement, or what the settlement was.

Experience shews the utility of that rule. An instance occurred in this Court, where, upon the occasion of a large trust fund becoming divisible, applications were made for payment of four several sums of 10,000*l.* each, to the husbands of married women, on affidavits that those sums respectively had not been settled. I refused to make the orders, and afterwards, on the production of the settlements, it was found, that every one of them included the large sums thus improperly asked to be paid to the husbands.

(a) See *Rose v. Rolls*, 1 *Beav.* 3 *Dr. & War.* 58.; *Bowman v. 270.*, and *Jones v. Smith*, 1 *Hare*, *Bell*, 1 *C. P. Coop. (t. Cot.)* 333. p. 67. and *Batt v. Culbertson*,

NOTE.—The proceedings of the Court are so frequently impeded by the production of informal affidavits on this point, that I venture

1846.

BRITTEN

v.

BRITTEN.

Form of affidavit of no settlement.

Form of affidavit of settlement not affecting the fund.

venture to recommend the following forms of affidavit to be made by the husband and wife, which, I believe, will be considered satisfactory in the various branches of the Court.

FIRST. "That no settlement nor agreement for settlement was made, entered into, or executed previous to, or upon, or since the marriage of us the said deponents."

SECOND. "That no settlement &c. (as before), except the settlement now produced, &c. and marked A. And we further make oath and say we believe that such settlement in no way affects the sum of £. mentioned in the petition lately presented by us in the above mentioned cause, and which is thereby sought to be obtained out of Court."

When the settlement is produced, the ordinary course, at the Rolls, is, for Counsel to state that he has read it and that it does not affect the fund in question. The Court usually acts on that assurance.

Jan. 21.

## PARKER v. PARKER.

A suit was instituted by legatees, whose interest (upon the happening of a contingency) might vest in the next of kin, against the executors alone. The next of kin were brought before the Court by supplemental bill. Held, that the executors were not improper parties to such supplemental bill.

AN administration suit was instituted by legatees, whose interests, on the happening of a contingency, would belong to the next of kin, against the executors; but the next of kin had not been made parties.

The next of kin were brought before the Court by supplemental bill, to which the executors were also made parties. The executors, by their answer, submitted, "that they were not necessary parties to the supplemental bill, and that they had improperly been made parties thereto, and that the same ought to be dismissed against them with costs."

Mr. Kindersley and Mr. J. H. Palmer, for the Plaintiffs, asked for the common supplemental decree.

Mr.

Mr. *Boyle*, *contra*, for the executors, supported the objection raised by their answer.

1846.  
PARKER  
v.  
PARKER.

Mr. *Belt*, for *Joseph Webb*.

The cases of *Greenwood v. Atkinson* (a), *Jones v. Howells* (b), and *Feary v. Stephenson* (c), were referred to. (d)

*The MASTER of the ROLLS.*

I do not think there is any doubt. The original bill was filed by legatees whose interests, on certain events happening, would pass to the next of kin of the testator, against the legal personal representatives. It turns out, in the course of the proceedings, that there are other persons filling the character of next of kin having an interest, and this supplemental bill is filed to bring these persons before the Court. It was proper that they should be brought before the Court, because the Plaintiffs' contingent interest might fail, and the executors would then become liable to account again to persons not before the Court.

If the next of kin were properly brought before the Court, in order that the accounts might be taken in their presence, surely the accounting parties, knowing the suit to be imperfect without them, ought also to know the parties in whose presence, and to whom, they were to account.

If

- (a) 5 Sm. p. 422. (d) And see *Parker v. Carter*,  
(b) 2 Hare, 342., affirmed by 4 Hare, p. 406., *Holland v. Baker*,  
Lord Lyndhurst, 20th Dec. 1845. 3 Hare, p. 73., *Dyson v. Morris*,  
(c) 1 Beavan, 42. 1 Hare, 413.



1846.

  
 PARKER  
 v.  
 PARKER.

If the executors had not been made parties, and had found it to their interest to take the objection, we should have had an argument, that the necessary persons were not before the Court, in the only proceeding to which the executors were parties, and that the executors did not, therefore, know that they were accountable to any other persons than the Plaintiffs in the original cause.

It is not necessary to decide that they are necessary parties, but I think it is clear that they are not improper parties. The supplemental bill is not informal, and I must, therefore, make the common supplemental decree.

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DUNT v. DUNT.

Jan. 21.

*In re* COLQUHOUN.

Petition by mortgagor for taxation of the mortgagee's solicitor's bill, presented five months after it had been discharged by retainer, dismissed with costs, on the ground that it neither alleged any circumstances of pressure nor any specific items of overcharge.

**T**HIS was a petition by *Samuel Dunt*, a mortgagor, for the taxation of the bill of *Mr. Colquhoun*, the mortgagee's solicitor, under the 6 & 7 *Vict. c. 73. (a)*

The property had been sold in 1844 for 1880*l.*, and on the 8th of *May* 1845 a settlement of accounts had been had, upon which occasion, the solicitor retained 94*l.*, the amount of his bill of costs.

The petition did not allege any circumstances of pressure, nor state any specific item of overcharge, but merely stated that the petitioner was "advised, that certain of the charges in the said bill of costs were improper."

The

(a) Sects. 38. and 41.

The petition for taxation was presented on the 27th  
of October 1845.

1846.

DUNT  
v.  
DUNT.

Mr. *Winstanley*, in support of the petition.

Mr. *Kindersley*, *contra*.

*The MASTER of the ROLLS.*

This is a petition for the taxation of a bill of costs after payment. It contains no "special circumstance" under which the order can be made. It is stated that payment was retained out of a sum of money received by the solicitor, but it is not alleged, that the bill was then, for the first time, delivered, or that there was no opportunity of examining it, or any fact of any sort from which oppression is either shewn or to be inferred.

Besides this, such a petition ought to be supported by the allegation and proof of specific errors; but nothing of the sort appears. From something that occurs in the correspondence, I thought, that, perhaps, an opportunity to amend should be given; but when I look at the affidavit, I do not find any sum complained of as erroneous. I have no hesitation, therefore, in dismissing this petition with costs; but, collecting from the correspondence that there may be some just ground of complaint, I will not preclude another application; and, therefore, I dismiss this petition, without prejudice to any future application which the petitioner may be advised to make.

1846.

1845.  
July 19.  
Nov. 8.1846.  
Jan. 29.

## LANE v. HARDWICKE.

As to the necessity of infants and the Attorney-General raising the points of their defence specifically by the answer, instead of putting in what is termed the common answer.

In a case, in which the defence of an infant had not been properly raised and proved, a decree was made for the Plaintiff, without prejudice to any bill to be filed by the infant within six months to establish his right.

IN 1829, *St. Andrew St. John*, the younger, granted an annuity to the Plaintiffs, secured on one-fifth of an estate, to which he was absolutely entitled, in remainder expectant on the life estate of his father.

It afterwards turned out, that previously, and on the 6th of *April* 1827, he had mortgaged the same property to *Swatman* and *Everard* to secure 2000*l.* (his father being a party to the deed). It further appeared, that a few days after, namely, on the 14th of *April* 1827, he conveyed the estate to trustees, upon trusts, which, so far as it is material to state them, gave him a life estate, with remainder to his children. This deed was expressed to be made for a nominal consideration, and the settlor at the time was neither married, nor did any marriage appear to have been then in contemplation.

The object of this bill was to make the Plaintiffs' securities available, and it insisted, that the settlement of the 14th of *April* 1827, being made for no valuable consideration, was fraudulent and void as against the Plaintiffs, and prayed a declaration to that effect.

*St. Andrew St. John* died in 1843, leaving an infant son, *St. Andrew Beauchamp St. John*, who was made a party to the suit. (a) He had appeared and had put in the common infant's answer, submitting his rights to the protection of the Court.

The

(a) See 5 *Beavan*, 222.

The Defendant *Hardwicke*, by his answer, stated, that the settlement had been made in consideration of the grantor's father paying off his debts.

1846.  
  
 LANE  
 v.  
 HARDWICKE.

The cause now came on for hearing, no evidence having been entered into by the Defendants.

Mr. *Kindersley* and Mr. *Hetherington* for the Plaintiffs. The settlement of 1827 purports to be, and was, voluntary. It is, therefore, void as against the Plaintiffs, under the statute of the 27 *Eliz. c. 4*.

Mr. *Turner* and Mr. *Kennion* proceeded to argue, that it appeared from Dr. *Hardwicke's* answer, that the settlement was not voluntary; that on the face of the deeds of the 6th and 14th of *April* 1827 themselves, it appeared, that they formed one transaction, and that the father had joined in the security to *Swatman* and *Everard*, on the faith of his son's executing the deed of settlement. That the settlement had, therefore, been executed for valuable consideration, and was valid and effectual as against the Plaintiffs' annuity.

Mr. *Tinney*, Mr. *Walford*, and Mr. *Roupell* for other parties.

*The MASTER of the ROLLS.*

In the case of infants, it has been erroneously thought, that it is merely necessary to put in what is called a common infant's answer, submitting his rights to the protection of the Court; but that is not so (*a*), for, in reality, the preparation of an infant's answer may in some cases require great consideration. He may have a  
 defence,

(*a*) *Holden v. Hearn*, 1 *Beavan*, 445.

1846.  
  
 LANE  
 v.  
 HARDWICK.

defence, yet at the hearing it may be found impossible to make it effectual, in consequence of its not having been properly raised and the proper facts put in issue by his answer. The same thing sometimes occurs when the Attorney-General puts in what is called the common answer; when the cause comes on for hearing, it turns out that nothing can be done, because the case has not been raised by his answer.

All I can do, in this case, is, to make a decree for the Plaintiffs, without prejudice to any bill which may be filed by the infant Defendant, within six months, for the purpose of establishing that the deed of the 14th of April 1827 was not voluntary.

Jan. 30, 31.

#### CROSS v. KENNINGTON.

A testator gave legacies, and charged his executors, to whom he devised real and personal estate, with the payment thereof. Held, that the legacies were charged on the real estate.

THE testator by his will expressed himself thus: —  
 “I direct my just debts, funeral and testamentary expenses, and the expenses of proving and registering this my will, be first duly paid.” He then gave his widow an annuity for life, and charged the real and personal estate thereby given to his executors for their own use with the payment thereof. He then devised a real estate to his executors, and gave divers pecuniary legacies, which he directed should be paid by his executors in six months from his decease, “if the money could be got in.” The testator afterwards proceeded to give a number of pecuniary legacies to *Moses Lovett*, and to the Plaintiff and others, which he directed should not be payable until after the decease of his wife, when he “charged his executors with the payment thereof.” He subsequently

subsequently gave the residue of his real and personal estate to *Kennington* and *Pilfoot* for their absolute use, and he appointed them his executors.

1846.  
  
 Cross  
 v.  
 KENNINGTON.

This bill was filed by the Plaintiff, as a legatee, on behalf of himself and all other the legatees, against the executors, and also *Mr. Brooks* (to whom *Kennington* had made a deposit of the title deeds of the testator's freeholds), praying a declaration, that the legacies were charged on the residuary real and personal estate, that the deposit might be declared invalid against the legatees, that the accounts might be taken, and the legacies secured.

*Kennington* the executor had misapplied the testator's personal estate, and 761*l.* due from him on account thereof was irrecoverable.

The question now raised was, whether, upon a deficiency of the personal estate, the realty devised was liable to the demands of the legatees.

*Mr. Kindersley* and *Mr. Rogers* for the Plaintiff.

The legacies are a charge on the real estate. The testator, having "charged his executors with the payment thereof," and devised and bequeathed real and personal estate to them, thereby imposed an obligation on them to pay the legacies out of all the property which they took, both real and personal.

*Aubrey v. Middleton* (a), *Henvell v. Whitaker* (b), *Bench v. Biles* (c), *Mirehouse v. Scaife*. (d)

The

(a) 2 *Eq. Ca. Abr.* 497.

(c) 4 *Madd.* 187.

(b) 3 *Russ.* 343.

(d) 2 *Myl. & Cr.* p. 707.

1846.  
  
 CROSS  
 v.  
 KENNINGTON.

The executors having accepted the gift subject to the condition, they cannot afterwards renounce it, *Attorney-General v. Christ's Hospital* (a), though the legacies should far exceed the property bequeathed to them: *Messenger v. Andrews*. (b)

Again, *Kennington* having misapplied the personal estate, the whole of his interest under the will is liable to make it good: *Priddy v. Rose* (c), *Woodyatt v. Gresley*. (d)

Mr. Teed and Mr. Nichols for *Pilfoot*.

The testator has not charged his real estate with the payment of his legacies. The case of *Parker v. Fearnley* (e) is in point; there the testatrix directed her legacies to be paid by her executor, to whom she afterwards gave all her real estates, and the residue of her personal estate, after payment of her debts and funeral expenses. It was held, that the legacies were not charged on the real estates, Sir *John Leach* saying, that he could not infer that the legacies were charged on the real estate, because the testatrix had directed her legacies to be paid by her executor; for, by law, pecuniary legacies were to be paid by him.

Mr. Turner and Mr. Elmsley, for the Defendant *Brooks*, also contended, that the legacies were not charged on the real estate. They argued, that as the testator, in the commencement of his will, when charging his debts on his real estate by directing them to be "first duly paid," had omitted the word "legacies," the inference was, that he had a different intention as to his legacies from that

as

(a) 1 *Russ. & Myl.* 626.

(d) 8 *Simons*, 180.

(b) 4 *Russ.* 478.

(e) 2 *Sim. & St.* 592.

(c) 3 *Mer.* 86.

as to his debts; and, further, that, as the testator had expressly charged his real estate with the annuity given to the wife, a similar intention could not be inferred as to the legacies.

1846.  
CROSS  
v.  
KENNINGTON.

Mr. Kindersley, in reply.

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS, after referring to the authorities, held that the legacies were charged on the real estate.

Jan. 31.

HARGRAVE v. HARGRAVE.

Jan. 31.

THE case is reported *antè*. (a) An issue was directed to be tried at the sittings after *Michaelmas* term, 1844. It was made a *remanet*, and the Plaintiff afterwards, without leave, withdrew the record. An application was made to take the bill *pro confesso*, which was refused, on the terms of the Defendant being at liberty to examine a witness (*Rogers*) *vivâ voce* before the Master, and the time was enlarged.

An application to stay the trial of an issue, for the purpose of obtaining further evidence, refused with costs, under the circumstances.

The solicitor of the Plaintiff having been seized with apoplexy, the time for trying the issue was again enlarged by the Court. The Plaintiff being ready for trial, the Defendant, on an application to the Court of Common

(a) 8 *Beavan*, 289.



1846.  
HARGRAVE  
v.  
HARGRAVE.

Common Pleas, obtained a commission for the examination of witnesses, and witnesses were accordingly examined at *Boulogne*, and their evidence had been published. It was now asked, by the Plaintiff, that the trial might be again postponed, to enable him to obtain evidence to disprove that taken on behalf of the Defendant under the commission. It was sworn that the witnesses for the purpose would be unable to attend until after *Easter* term.

Mr. *Turner*, in support of the application.

Mr. *R. Perry*, for the Defendant, was not heard by

*The MASTER of the ROLLS*, who said, I cannot grant this application, but I will not interfere with the discretion of the common law Judge on the subject.

Here, after so great a lapse of time since the issue was first directed, after so many postponements, and considering that the avowed object is to contradict the evidence of the witnesses which has been published, I do not think it right to grant the application.

If the trial should not be satisfactory, it will still be open to the parties to make an application for a new trial. I must refuse the application with costs.

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1846.

BIDDULPH v. Lord CAMOYS.

Feb. 10.

**T**HE time limited by the General Orders for filing exceptions having expired, an order was made, by consent, for referring them *nunc pro tunc*. The registrar declined drawing up the order, in consequence of the 17th General Order (a), by which it is directed, "That no order is to be made, for leave to file exceptions, *nunc pro tunc*."

An order for leave to file exceptions in the form of *nunc pro tunc* will not now be made, even by consent, but a special order may be made for filing them, notwithstanding the time limited has expired.

Mr. *J. A. Cooke* now applied to have the order drawn up : it being consented to,

*The MASTER of the ROLLS* said, that the order could not be drawn up in the form forbidden by the General Orders of the Court ; but an order might now be made, for referring the exceptions, notwithstanding the time limited had expired.

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(a) 17th Order of May 1845, Ord. Can. 292.

1846.



1845

Dec. 20.

1846.

Jan. 12, 23.

Feb. 26, 27.

Under the orders of *May*, 1845, in a case where there are several Defendants, any one of them may move to dismiss for want of prosecution at the expiration of four weeks after his answer is sufficient, if the Plaintiff has since taken no step, and that, although his co-defendants may not have put in their answer; but an order to amend, obtained and served after the notice of motion and before its hearing, is, under ordinary circumstances, an answer to the motion to dismiss, but the Plaintiff having, by such means, intercepted the Defendant's right, must pay the costs of the motion.

## LESTER v. ARCHDALE.

**T**HIS was a motion to dismiss for want of prosecution under the following circumstances:—The bill was instituted against several Defendants. The Defendant *Archdale* filed his answer, which became sufficient on the 13th of *November* 1845. The four weeks from that time expired on the 12th of *December*, and on the 17th of *December*, *Archdale* gave notice, for the purpose to dismiss the bill for want of prosecution. The Defendants had not answered: and in the meantime on the 19th of *December* (between the notice and motion day), the Plaintiff obtained, as of course, an order to amend his bill. This was the order of that description he had obtained. He did not, but after the Defendant had delivered his brief, tendered 20s. for the costs of the motion.

Mr. *Bromehead*, in support of the motion, argued as follows:—By the 114th Order (a), where the Plaintiff does not obtain and serve an order for leave to amend the bill, “within four weeks after the answer, or the last of the answers” is sufficient, a Defendant may move to dismiss. These words “answer or the last of the answers” have been held to mean, “the last answer of any one of several Defendants:” *Dalton v. Hayte*. No such step having been taken by the Plaintiff within four weeks from the expiration of the time when Defendant *Archdale*'s answer became sufficient, he is not entitled to move to dismiss. Even if the order to amend be an answer to this motion to dismiss,

(a) *Ordines Can.* 330.(b) 7 *Beavan*, 586.

the Plaintiff, having intercepted the Defendant's right, after he had given his notice of motion, must pay the costs: *Waller v. Pedlington* (a), and the tender of 20s. was insufficient.

1846.  
LESTER  
v.  
ARCHDALE.

Mr. Lloyd, for the Plaintiff. By the 16th Order, Art. 33. (b), and 66th (c) of 8th of May 1845, a Plaintiff is entitled to have one order of course to amend, within four weeks "after the answer, or the last of several answers is to be deemed sufficient." It could not have been intended that a Defendant should be entitled to dismiss the bill before the expiration of the time allowed to the Plaintiff to amend his bill. The 114th Order, consistently enough, provides, that a Defendant shall not be at liberty to move to dismiss, until "four weeks after the answer, or the last of the answers is found or deemed sufficient." The four weeks mentioned in the 66th and 114th Orders are identical, and here the Defendant, who has moved before the answers of the other Defendants are found, or are to be deemed sufficient, is premature in his application.

[*The MASTER of the ROLLS.* It has been decided in the case referred to, that this is not the proper construction of the 114th Order.]

That may be so; but *Dalton v. Hayter* does not decide the question now before the Court, which is, whether the order to amend is regular; for if it is, the bill cannot be dismissed for want of prosecution.

Mr. Bromehead, in reply.

*The MASTER of the ROLLS* reserved his Judgment.

*The*

(a) 4 Beavan, 124.

(c) *Ordines Can.* 308.

(b) *Ordines Can.* 287.

1846.

*The MASTER of the ROLLS.*

LESTER

v.

ARCHDALE.

In this case the Defendant's answer was filed on the 15th of *June* 1845. On the 13th of *November* it was deemed sufficient. Four weeks from that time expired on the 12th of *December*, and the Defendant, on the 17th of *December*, served the Plaintiff with a notice of motion, to be made on the 20th, to dismiss the bill for want of prosecution.

This notice was regularly given, under the 1st Article of the 114th Order, and the construction which has been put upon it.

But on the 19th of *December*, the day before the motion was to be made, the Plaintiff obtained an order as of course to amend his bill, and the question is, whether that order was regularly obtained. If it was, it is an answer to the motion, upon which no order can be made, though, under the circumstances, the Plaintiff must pay the costs of it.

Now the 66th Order relates to the same matter as the 33rd Article of the 16th Order, and in these Orders, the expression "the last of several answers" means the last answer of one of several Defendants; and as, in this case, no former order of course to amend had been obtained, and four weeks had not elapsed after the last answer of the other Defendants had been deemed to be sufficient, I am of opinion that the order to amend was regularly obtained; and that no order can be made on the Defendant's motion, but that the Plaintiff must pay the costs of it. (a)

If

(a) See *Forman v. Gray*, *post*.

If pending this application, the time within which the Plaintiff was bound to effect his amendments has expired, it must be provided for.

1846.  
  
 LESTER  
 v.  
 ARCHDALE.

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The ATTORNEY-GENERAL v. BINGHAM.

Feb. 11.

**M**R. AUSTEN moved for the production of documents.

It is not the practice to order the production of documents admitted in the answer, for a limited period.

Mr. Chandless. The documents will be wanted by the Defendant for the purpose of his defence. They ought only to be deposited for a limited time to be stated in the order, and then returned to the Defendant.

The MASTER of the ROLLS thought, that, according to the practice, this could not be done, and that the usual order must be made.

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1846.

Jan. 12.  
Feb. 20. 23.

## YOUNG v. QUINCEY.

On a motion to dismiss for want of prosecution, the Plaintiff undertook to file a replication. The case stood over to enable him to perform his undertaking, and having so done he was ordered to pay the costs of the motion.

**T**HE answer was filed on the 5th of *April*, since which no step had been taken.

Mr. *Glasse* moved to dismiss for want of prosecution. He stated, that Mr. *Lloyd* appeared for the Plaintiff, and undertook to file a replication, and to submit to the usual order: that the only question was, as to the costs of the application.

*The MASTER of the ROLLS.*

If he had filed a replication after the notice of motion, he would have to pay the costs of the application. He has not done so, and now only undertakes to do so. I think he ought to pay the costs.

There cannot yet be said to be any settled practice in a case like this; but the better way will be to allow this motion to stand over till the next day of motions, to give the Plaintiff an opportunity to file a replication. This will save the necessity of another application in case of his default.

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Feb. 23. The Plaintiff filed a replication, and was ordered to pay the costs.

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See *Corry v. Curlewis*, 8 Bear. 606.

1846.

WRIGHT v. KING.

Jan. 23.  
Feb. 11.

THE Defendant's answers had been filed more than twelve months. *A special order to amend, without prejudice to an injunction, must be made to the Court and not to the Master.*

Mr. Kindersley and Mr. Calvert moved for liberty to amend without prejudice to the injunction. (a) *A party had some time since left home, and had not been heard of, and it was not known whether he was living or dead. His solicitor ceased to act for him, but no order had been made for changing solicitors. Held, that notices served on such solicitor were regular.*

The MASTER of the ROLLS. Why do you not apply to the Master ?

Mr. Kindersley. Because we ask that the order may be made without prejudice to the injunction. (b)

The MASTER of the ROLLS ordered the application to stand over, as the affidavit in support of it was informal.

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11. Mr. Kindersley and Mr. Calvert renewed their application; and a doubt having been suggested, whether this application ought to be made to the Court or to the Master, in the first instance, they referred to *Christ's Hospital v. Grainger* (c), and *Strickland v. Strickland*. (d)

The MASTER of the ROLLS.

In every case in which a Plaintiff is desirous of obtaining an order for leave to amend, with an adjunct over

(a) See the 60th and 66th Orders of 8th May, 1845. Ord. Can. 306, 308.

(c) 1 *Phillips*, 634.

(d) 4 *Beavan*, 146.

(b) See *Rees v. Edwards*, 1 *Kern*, 465.



1846.  
  
 WRIGHT  
 v.  
 KING.

over which the Master has no jurisdiction, the application must be made to the Court. There can be no doubt about it.

I do not think there was much doubt respecting the case of *Christ's Hospital v. Grainger*. I had a communication with the Lord Chancellor on it, and I then pointed out to him several cases, in which this Court had deviated from the strict letter of the act of parliament, in order to carry into effect its real intention. It was at one time argued, that if, at the hearing of a motion or of a cause, an amendment was found to be necessary, and every body so agreed, the Court was to suspend its proceedings, until the parties had made an application to the Master for leave to amend. This was perfectly unreasonable. The difficulty was in getting over the strict words of the act, but that was done by ascertaining and adhering to the real object and intention of the legislature. I must make the order.

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A Defendant *Jones* did not appear, but

Mr. *Daniel* said, that he had been instructed by Mr. *Cornwall*, the solicitor, who had acted for the Defendant *Jones*, to state to the Court, that *Jones* had some time since left his home, and had never since been heard of by his family or connexions, and that it was not known whether he was living or dead: that *Cornwall* had ceased to act for him, though no order had been obtained for changing the solicitor (a); but that all notices were, nevertheless, served on him.

*The*

(a) 18th Order of October, 1842. Ord. Can. 214.

*The MASTER of the ROLLS.*

1846.

It cannot be helped. The Defendant has left this gentleman to act for him, and I cannot relieve him from the obligation he has contracted.

WRIGHT  
v.  
KING.

The Plaintiff is in a situation of some degree of risk, in proceeding without knowing whether the party is dead or alive (*a*).

(*a*) See *Davidson v. Leslie*, *antè*, 104.

HICKS v. Lord ALVANLEY.

Feb. 18.

THE bill was filed on the 8th of *July* 1845. The Defendant was ordered to give security for costs, which he effected on the 6th of *September*. A treaty for a settlement was entered into, which proved ineffectual, and the Defendant having neglected to put in his answer, a sequestration issued against him on the 10th of *February*. Proceedings of contempt for want of answer stayed, on proof of the Defendant's inability, by reason of illness, to put in his answer.

Mr. *Roupell* and Mr. *E. Montagu*, for the Defendant, now applied to stay the proceedings and for six weeks' time to answer, upon evidence of medical men and others, that the Defendant was wholly unable, through illness, to prepare and put in his answer.

Mr. *Turner* and Mr. *James Anderson*, *contrà*, opposed the application, and stated that while the Defendant was neglecting to put in his answer, he was indirectly proceeding against the Plaintiff at law.

M 2

The

## CASES IN CHANCERY.

*The MASTER of the ROLLS.*

3.  
KS  
rd  
NLEY.

There can be no doubt, that you cannot use the process of the Court in such a way as to endanger a man's life (a), nor can you use it for the purpose of compelling a Defendant to put in an answer, when, from illness, he is in a state of mental and bodily incapacity.

Let the proceedings for contempt be stayed for a month, the Defendant entering into a proper undertaking as to the proceedings at law, and paying the costs of this application.

(a) *Chalie v. Pickering*, 1 Keen, 749.

## DONOVAN v. NEEDHAM.

Jan. 26.  
March 2.

Interest on legacies is given for delay of payment, and consequently, until the day of payment arrives, no interest is, in general, demandable.

When a legacy is given by a parent to his child, interest is allowed thereon, by way of maintenance, though the day of payment has not arrived. But the rule does not apply, where the testator has, by his will, made a provision for the child's maintenance.

**JAMES DONOVAN**, by his will, dated the 25th of March 1826, after directing his debts to be paid, and giving to his wife a life interest in certain estates and property, gave and bequeathed to her the sum of 2000*l.*, to be paid to her in twelve months after his decease, with interest thereon at the rate of 5 per cent., such interest to commence from the day of his death. He afterwards gave his mansion-house at *Buckham Hill*, and other real estates, to trustees, to the use of his son *George* and the heirs of his body, with remainder, successively, to the use of his other sons, and the heirs male of their bodies, with other remainders over. He left and bequeathed to his son *George* the sum of 20,000*l.* in 3 per cent. consolidated annuities, to be paid to him on his attaining the age of twenty-one years as thereafter was particularly mentioned. And after giving to his son *George* certain effects

effects at *Buckham Hill*, he gave to his trustees all other real, freehold or leasehold estates or properties, of what nature or kind soever, or wheresoever situate, to hold to them, according to the nature of the estates, and all stocks, funds, mortgages, judgments, and securities, bonds, bills, notes, and sums due to him by book account, and all personal property of which he should die seised and possessed, and, after payment of the said two respective legacies of 2000*l.* to his wife, and 20,000*l.* consols to his son *George* as aforesaid, he willed and directed, that his trustees should stand seised and possessed of the *residuum* of his said properties, for the use of his younger children, as therein mentioned.

1846.  
DONOVAN  
v.  
NEEDHAM.

After directing the times of paying his younger children, and making gifts over in the event of their failure, he proceeded as follows:—“In case my said son *George Donovan* shall die before he attains the age of twenty-one years, I leave and bequeath the said sum of 20,000*l.* to my eldest son, that I may leave at the time of my death, taking under this my will an estate tail in *Buckham Hill*; and I will and direct such other of my son or sons, taking *Buckham Hill* as aforesaid, shall not take or be entitled to take any part of the said *residuum* of my said estates and properties, except such son shall be an only child, and thereby become entitled to the whole of the said *residuum* of my said properties.”

After providing for the event of his son's dying without issue male, he proceeded as follows:—“It is my will, and I hereby direct, that my said trustees &c., shall and will, during the minorities of my said children, pay and advance such sum and sums of money as they may think proper and necessary, for the education, maintenance, and clothing of my said children, and for placing them

1846.  
  
 DONOVAN  
 v.  
 NEEDHAM.

in such professions and business as it may be thought advisable, and as my said trustees, in their discretion, may see fitting and necessary, with the advice and consent of their mother, if living, and if not, at their own discretion." By a codicil, an additional legacy of 15,000*l.* was given to the son *George*.

The testator left his eldest son *George* and three other children surviving him, all of whom were then infants.

The cause was heard upon the 17th of *March* 1836, when it was held by the Master of the Rolls, that *George* was entitled to a transfer of his legacies on his attaining twenty-one; but was not entitled, until that time, to any dividends or interest thereon, though he was to be maintained, like the other children, out of the income of the residuary estate.

The cause now came on to be reheard.

Mr. *Kindersley* and Mr. *W. H. Clarke*, for the testator's eldest son *George*, contended, that he was entitled to the dividends and interest on his legacies from the death of the testator, or from the end of one year afterwards.

Mr. *Turner* and Mr. *Randell*, for the younger children.

Mr. *Roupell* and Mr. *Heathfield*, for trustees.

*Crickett v. Dolby (a)*, *Wynch v. Wynch (b)*, and *Hearle v. Greenbank (c)*, were cited.

*The*

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(a) 3 *Ves.* 10.  
 (b) 1 *Cox*, 433.

(c) 3 *Atk.* p. 716.

*The MASTER of the ROLLS.*

1846.

DONOVAN  
v.  
NEEDHAM.  
March 2.

Upon the hearing of the cause, I was of opinion, that *George Donovan* was entitled to have his two legacies transferred and paid to him on his attaining the age of twenty-one years, but was not entitled to any dividends or interest thereon in the mean time, and that he was entitled to be maintained with the other children, out of the income of the estate, before the legacies were separated from it.

Upon the declaration, not very accurately expressed, which was intended to carry into effect this opinion, the cause has now been reheard, and it has been argued, that, subject to his maintenance and education, the son *George* ought to be held entitled to dividends and interest on his legacies, from the testator's death, or from the end of one year afterwards.

The rules, in cases of this kind, are distinctly stated by Lord *Hardwicke* in *Hearle v. Greenbank*. (a) Where legacies are given payable at a certain time, they carry no interest; for interest is for delay of payment, and, consequently, till the day of payment comes, no interest is demandable. This is the general rule. But where a legacy, payable at a future time, "is given by a father to a child, the Court allows interest, giving it by way of maintenance," till the time of payment arrives. If, however, maintenance is provided from the general fund of the estate, the reason for allowing interest on the legacy fails, and interest is not allowed. In the case under Lord *Hardwicke's* consideration, the testatrix gave to her daughter certain annual sums till she attained the age of twenty-one years, directing the said sums to be applied by her executors, for the education and

(a) 3 Atk. 716.

1846.  
  
 DONOVAN  
 v.  
 NEEDHAM.

and maintenance of her daughter, according to their discretion, and then she gave to her daughter 8000*L.*, to be paid to her when she should attain the age of twenty-one years, with a gift over, if she died under that age without issue; and Lord *Hardwicke* decided, that she was entitled to no more interest in the meantime.

In the case of *Wynch v. Wynch (a)*, Lord *Kenyon* stated the rule thus: — “It is very clear, that when a father gives a legacy to a child, whether it be a vested legacy or not, it will carry interest from the death of the testator, as a maintenance for the child; but this will be only where no other fund is provided for such maintenance; for it is equally clear, that where other funds are provided for the maintenance, then, if the legacy be payable at a future day, it shall not carry interest till the day of payment comes, as in the case of a legacy to a perfect stranger.” In the case before Lord *Kenyon*, the testator gave to each of his daughters 10,000*L.*, to be paid them respectively at their attaining the age of twenty-one years, or day or days of marriage, which should first happen; and then directed his trustees to apply such sums of money, out of his personal estate, towards the maintenance and education of his daughters, as to them should seem fit, not exceeding the interest of their respective portions, after the rate of 4 per cent. Notwithstanding this distinct reference to the interest of the portions for providing for the maintenance, Lord *Kenyon* declared, that the daughters were not entitled to interest on their legacies until the same became payable, but only to maintenance, not exceeding 4 per cent. on their legacies.

After

(a) 1 *Cor*, 433.

After giving my best attention to the will of Mr. *Donovan*, I am unable to distinguish it, in principle, from the case of *Wynch v. Wynch*. In an event which was contemplated by the testator, the legacies given to *George* might have gone, with the rest of his estate, to the same child; and whatever might have been directed by this Court, for convenience and safety of administration, if the estate had been administered here, there is nothing to shew any intention of the testator, that the legacies given to *George* should be separated from the rest of the estate, till the time for transfer and payment arrived. In giving the benefits which he intended for his younger children, the testator speaks distinctly of the *residuum* of his estate, after paying the legacies; but in giving directions for the maintenance and education of his children, he speaks of all his children, and does not point to the *residuum* as the fund out of which the maintenance is to be supplied; but gives a general direction to the executors for payments which they are to make, and there is no special designation of the funds out of which the payments were to be made. I do not think that there is any thing in this will to indicate, that the son *George* was to be maintained out of the income of the legacies given to him, or that any difference arises, by reason of the authority given to place the children in business or professions. If sums of money had been paid to *George* for his advancement, some question might possibly have been raised, as to deducting the amount from his legacy; but the question of interest upon the legacies depends upon this, whether the testator has provided for the maintenance and education out of his general estate; and it still appears to me that he has, and, therefore, that the son *George* is not entitled to the dividends and interest which he claims.

1846.

  
DONOVAN  
v.  
NEEDHAM.

At



1846.  
  
 DONOVAN  
 v.  
 NEEDHAM.

At the same time, it appears to me that the decree is a little inaccurate in form. It would have been better to declare, simply, that *George* was entitled during his minority to be maintained and educated out of the general income of the testator's estate; and that he was not entitled to dividends and interest on the legacies of stock and money given to him, until the same respectively became transferable and payable. I scarcely think it worth while to make any variation, as the effect is the same, but the variation may be made, if desired.

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NOTE. — See the note to *Leslie v. Leslie, Ll. & Goo. (t. Sugden)*, p. 6.

1845.  
 July 8. 15. 17.  
 31.

1846.  
 January 15.

### STURGE v. DIMSDALE.

The fact of a petition being unopposed, is not, of itself, a sufficient reason for the disallowance of the costs of two counsel.

Costs of two counsel, upon a petition of a retiring trustee for a reference to appoint a new trustee, and of a petition to confirm the Master's report, allowed, under the circumstances.

**T**HIS was a petition questioning the finding of the Taxing Master.

The case, on further directions, is reported *antè* (a), upon which occasion the points necessary for winding up the suit were determined. It there also appears, that the funds consisted of 20,000*l.* sterling, 46,000*l.* consols, 11,000*l.* reduced, and a sum of cash.

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(a) 4 *Beavan*, 462.

A petition to review a taxation was successful, but the petitioner, not having taken proper steps to satisfy the Taxing Master when the matter was in his office, was ordered to pay the costs.

The Court having determined to communicate with the Taxing Master as to a proceeding in his office, declined to receive an affidavit tendered by the parties, of what had there taken place.

The surviving trustee, being desirous of retiring from the trusts under the powers contained in the testatrix's will, presented a petition for that purpose on the 25th of *May* 1844, and on the 24th of *June*, the petition came on, and an order was made, without opposition, for the appointment of a new trustee. The Master appointed a new trustee accordingly, and a petition being presented for the confirmation of his report, it was, on the 30th of *July* 1844, confirmed, without opposition, and the Master was directed to tax the costs of the two petitions as between solicitor and client.

1845.  
STURGE  
v.  
DIMSDALE.

On each application to the Court, the trustee had instructed two counsel, and on the taxation the Taxing Master had allowed the costs of one counsel only. A petition was presented for a review of the taxation as to that matter.

Mr. *Turner*, in support of the petition. The Master has not exercised a sound discretion in saying that, because the petitions were unopposed, two counsel ought not to be allowed. It is not, for that reason, or even because a petition is consented to, that the attention of two counsel is unnecessary. Petitions of this description, of all others, require the most anxious care and consideration, not only because, upon them, large funds are paid out of Court and carried over to the different accounts, according to the intricate rights of different parties, but because the Court having before it no effective opposition, is necessarily obliged to rely on the statements which the experience of counsel tells them are necessary to be made. The Court ought, therefore, to have the best assistance which under the circumstances can be afforded; and it is, therefore, most important, not only to the parties, but to the due administration of justice and to the public, that such assistance should  
not

1845.  
  
 STURGE  
 v  
 DIMSDALE.

not be so limited, as to deprive the Court of the best assistance which the experience of senior counsel can afford, and the minute knowledge of the case possessed by the acting junior in the cause.

These petitions were not, by any means, as of course. Here the trustee was applying to be discharged from the trusts, and the first question was, whether he was entitled to do so at the expense of the *cestui que trust*. (a) Secondly, it required great care to see that the trustee was duly discharged, which he would not have been, unless the funds had been duly transferred to the new trustee, and here, the funds were very considerable in amount, and 30,000*l.*, part of them, were not in court; but standing in the name either of the testatrix, or of other parties.

By neglecting to instruct the leading counsel, the party might have lost the benefit of his retainer, a point which the Court in *Lucas v. Peacock* (b) considered ought to be put beyond all doubt; and the Vice-Chancellor of England, in *Cooke v. Turner* (c), expressed a strong opinion on the propriety of having a junior counsel even in motions of small importance.

Mr. Bacon, *contra*. The Master did not decide on the ground that it might not be proper, in some cases, to retain two counsel; but, in dealing with this particular case, he came to the conclusion, that one counsel was sufficient. The two petitions were disposed of as a matter of course, not only without opposition, but without

(a) See *Howard v. Rhodes*, 1 *Keen*, 581., and *Coventry v. Coventry*, 1*b.* 758., and *Greenwood v. Wakeford*, 1 *Beavan*, 576.

(b) 8 *Beavan*, 1.

(c) 12 *Simons*, 649.

out any being threatened or expected. No grounds were stated to make it expedient to employ two counsel, except the chance of the loss of the retainer of the leading counsel, but that was unnecessary, for the cause had been wound up upon further directions, and was no longer in an active state.

1845.  
STURGE  
r.  
DIMSDALE.

An expense thus uselessly incurred ought not to be borne by the respondents.

He also complained of the unnecessary length of the present petition.

Mr. Turner, in reply.

*The MASTER of the ROLLS.*

I will not make any order on this petition until I have communicated with the Taxing Master, to ascertain the grounds on which he has decided. If he has proceeded on the notion, that because the petition was unopposed, one counsel only ought to be allowed, then I think he is wrong in his conclusion.

Petitions, though unopposed, sometimes involve considerations of the utmost importance. The Court, on such petitions, is frequently called on to administer very large estates, and to distribute considerable sums of money; and on such occasions, the rights of the parties are sometimes found to be involved in a state of so great a complication, that the Court would be unable to understand them without severe application and the assistance of well experienced minds. I may say, that, without the assistance of most able counsel, many cases arise here, in which I should be utterly unable to come to a satisfactory conclusion.

The

1845.  
STURGE  
v.  
DIMSDALE.

The necessity of having two counsel, depends on a great variety of circumstances; and I scarcely know any case in which it would be less safe to lay down a fixed rule, than in the instance of unopposed petitions; for funds to the extent of 4,000,000*l.* are annually paid out of court, and transfers of stock are also made to a very large amount, and this is in many cases done upon petitions not hostilely conducted. The notion, therefore, of depriving the Court of any proper assistance in arriving at a just decision, or of taking from the suitors any proper protection on unopposed petitions, ought, I think, to be entirely laid out of the question.

Cases do, however, occur in which such assistance is unnecessary. Some cases are so plain, that I wish, for the sake of the suitors, that orders could be obtained as of course; but this might be attended with very great danger in many cases.

In the present case, there appears to have been some difficulty upon the appointment of new trustees. By a due appointment, the new trustee would be charged with the subsequent duties, and thereupon, the old trustee would be discharged. It was, therefore, necessary for the protection of the petitioner to see that he was properly released from the trust.

I am anxious to know the ground on which the Master came to this conclusion; but I do not think there is any difficulty about the general principle. The case does not rest on the doctrine of retainer, but on the assistance which the Court is entitled to have, and cannot so well obtain through counsel of one class as of the other class. There are cases in which the assistance of junior counsel, who are acquainted with all that has taken place in the course of the proceedings, is absolutely

lately necessary, and there are other matters in which the great experience and assistance of leading counsel are equally requisite. Professional experience and skill, a perfect knowledge of the facts and practice of the Court are requisite, in order to know what it is necessary to state to the Court, and for that purpose, the combined assistance of both senior and junior counsel may sometimes be necessary. Without the assistance of leading counsel every thing considered material might be fairly and honestly stated upon an unopposed petition, yet, for want of due experience in stating the case and the circumstances affecting it, there might be some considerable risk of error.

1845.  
STURGE  
v.  
DIMSDALE.

I will consider this petition.

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The case was adverted to again, when

July 17.

The MASTER of the ROLLS said, he had communicated with the Taxing Master, and he stated the result of his inquiry.

Mr. Turner observed, that the circumstances now stated were new to him, and he asked that the matter might stand over.

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Mr. Turner now produced an affidavit of what had taken place before the Taxing Master, which he was desirous of bringing before the Court, but,

July 31.

The MASTER of the ROLLS, after consideration, held it inadmissible.

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The

1846.

STURGE  
v.  
DIMSDALE.

*The MASTER of the ROLLS.*

I have communicated with the Master in this case, and I learn, that he thought that some reason ought to be brought forward to sanction the allowance of two briefs upon an unopposed petition. The first reason offered was, that counsel was entitled to a brief under the law of retainer; and the second was, that it was necessary upon the merits of this petition. The Master proposed to allow the costs of the two briefs upon the certificate of counsel of their propriety; but the petitioner neither produced the certificate, nor brought the matter before the Master on the merits, and the costs were consequently disallowed.

I have already expressed my opinion, that the Master had no right to require the assistance of counsel upon the point; and I am of opinion, under the circumstances now brought forward, that two briefs ought to have been allowed. The amount may be now allowed, but the petitioner, having been in error in not producing sufficient reasons to the Master, must pay the costs of the petition.

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1846.

LUCAS v. PEACOCK.

THE circumstances of this case are sufficiently stated in the judgment.

Mr. Turner and Mr. Piggott, for Mr. Haverfield, cited *Anon.* (a)

Mr. Kindersley and Mr. Bagshawe, for Christopher Lucas.

12. The MASTER of the ROLLS.

Christopher Lucas, one of the Defendants in this case, was the administrator of his deceased wife and of his two sons, William Bailey Lucas and Harry Vernon Lucas, and the Petitioner, Mr. Haverfield, was his solicitor. During the employment of Mr. Haverfield, certain sums, in which Mr. Lucas was interested as the administrator of his sons, were brought into Court, and, by an order dated the 30th of July 1842, it was ordered, that 4577l. 4s. 8d., part of a larger sum standing to a mortgage account, should be treated as part of the residue of the estate of the testator, and that after certain payments were provided for, two sixths of one fifth of the remainder of the fund should be transferred to Mr. Lucas, as administrator of his two sons.


In the month of January 1843, Mr. Haverfield ceased to be employed as Mr. Lucas's solicitor, and Mr. John Bailey having become such solicitor in the month of February 1843, he assisted in taking out of Court some sums

A solicitor's lien upon the fund is not a general lien. It extends only to costs in the cause, and costs immediately connected with costs in the cause; as, for instance, the costs of successfully protecting a solicitor's right to the costs in a cause.

A stop order does not affect any right, and it is therefore unnecessary to specify that it is made "without prejudice."

(a) 2 Ves. sen. 25.



1846.  
  
 LUCAS  
 v.  
 PEACOCK

sums of stock and money to which *Mr. Lucas* was entitled.

In *June 1843*, *Mr. Bailey* applied to *Mr. Haverfield* for certain bills of costs, with a view to have the same taxed. *Mr. Haverfield*, to some extent, denied the right to have them taxed. A petition for taxation was presented on the behalf of *Mr. Lucas*, and ultimately, an order was made, by consent, on the 22d of *December 1843*, and it thereby was ordered, that all matters in difference between *Mr. Haverfield* and *Mr. Lucas* should be referred to the award of *Mr. George Lake Russell*. He afterwards made his award, dated the 23d day of *April 1844*, and thereby awarded, that *Mr. Lucas* should pay to *Mr. Haverfield* the costs of the said petition, of the reference and of the award (the costs of the award being stated to be 15*l.* 9*s.* 6*d.*), and that as to the other costs, each party should pay his own.

*Mr. Lucas* paid the costs of the award at once; *Mr. Haverfield* soon afterwards made out his bill of the other costs which he claimed, including the costs of the award. They amounted, in the whole, to 110*l.* 16*s.* 10*d.*, and excluding those costs to the amount of 15*l.* 9*s.* 6*d.*, which had been paid, *Mr. Haverfield's* bill amounted to 95*l.* 7*s.* 4*d.*

Some attempt was made by *Mr. Bailey* to procure a settlement of the bill without taxation, and *Mr. Haverfield* was desirous to have *Mr. Bailey's* undertaking, that what was due on the bill should be paid out of the fund in Court. *Mr. Bailey*, so far as the question depended on him, was not unwilling that payment should be made out of the fund; but some delay, by the illness of *Mr. Lucas* having occurred, *Mr. Haverfield* presented a petition, and obtained an order to tax the bill, and,  
 at

at the same time, obtained a *stop order*, to prevent the fund being paid out without notice to him. (a)

1846.  
LUCAS  
v.  
PEACOCK.

The bill was taxed at 94*l.* 10*s.*, the sum of 17*s.* 4*d.*, and no more, having been taken off. Mr. *Haverfield* has presented a petition, praying, that Mr. *Lucas's* share of the funds in Court may be applied in satisfaction of what is due to him on his bill.

There is no dispute as to the amount of the bill, nor as to the liability of Mr. *Lucas* to pay it, and no allegation that he is unable, or even unwilling, to pay it. There being, substantially, no difference between the parties, it was, for some time, difficult to discover what was the controversy, and it seems to be no more than this, that Mr. *Haverfield* insists upon being paid out of the fund in Court, whilst the Respondents insist, that Mr. *Haverfield*, though entitled to be paid, is not entitled to be paid in the form and manner which he has asked by his petition, and that he has no lien upon the fund in Court for the payment of his bill.

If the circumstances which have been stated to me, on the part of Mr. *Lucas*, are true, it can make no difference to Mr. *Haverfield*, or to Mr. *Lucas*, or Mr. *Bailey*, his solicitor, whether an order is made upon Mr. *Lucas* personally to pay the money, or an order is made for payment in the way proposed by this petition, and I regret very much, that the parties have not settled the matter, and thus prevented the necessity of making the order at all.

But as I am required to interfere, it appears to me,

1. That Mr. *Haverfield* had a lien upon the fund for any costs which were due to him as costs in the cause.
2. That

(a) *Hobson v. Shearwood, 8 Beavan, 486.*

1846.  
 {  
 LUCAS  
 v.  
 PEACOCK.}

2. That the costs of Mr. *Lucas's* petition, and of the reference under the order of *December* 1843, so far as the petition and the costs thereof related to costs in the cause, were costs incurred in defending Mr. *Haverfield's* right to the costs which he has received or retained as costs in the cause.

3. That the attempt made to reduce the costs, which he had retained as costs in the cause, and to which his title was established, ought to be considered as an attempt made to relieve the fund from a just charge upon it, and it appears to me that Mr. *Haverfield* has a right to be paid the costs of his successful defence out of the fund.

But the solicitor's lien upon the fund is not a general lien; it extends only to costs in the cause, or costs immediately connected with the costs in the cause (a), and it is stated and not denied, that a considerable part of Mr. *Haverfield's* claim referred to Mr. *Russell*, consisted of costs incurred in respect of matters not relating to the estate of *William Bailey Lucas* or *Harry Vernon Lucas*, or in other words, as I understand the case, consisted of costs not costs in the cause.

It does not appear that any distinction was made, on this account, in the petition of Mr. *Lucas*, on which an order was made for the taxation of Mr. *Haverfield's* costs. But the question does not now relate to taxation or even to payment, but to lien, and I think that can order to be paid, out of the fund in Court, on that part of Mr. *Haverfield's* costs, which consists costs in the cause, or costs incurred in protecting Mr. *Haverfield's* right to the costs in the cause, and that to the rest, I must simply order payment.

I a

(a) *Bozon v. Bolland*, 4 *Myl. & C.* 354.

## CASES IN CHANCERY.

161

insisting that the parties, having persevered thus long in litigation so unnecessary and absurd, will not be dissuaded from a division of the charge, so as to ~~make a compromise~~ without further inquiry, to frame ~~some~~ an account of part out of the fund and the ~~balance of the fund~~ of Mr. Carr.

1846  
— —  
Lilas  
I.  
FALUCK.

And now when it is the Master's inquiry, what was Mr. Fitzgerald's bill consist of charges in which he was either a cost in the cause, or as costs incurred in entering the charges in which he was entitled to stand in the cause.

[illegible]

No cost on other side

U. S. DEPARTMENT OF COMMERCE  
BUREAU OF ECONOMIC RESEARCH

1. Answer each of the following questions in detail.  
2. Use the following information to answer the questions.

Is there a ...

~~In summary~~, the other morning I was informed by  
the FBI that the man who had been seen at the home of the  
subject was the same man who had been seen at the party.

1846.  
  
 LUCAS  
 v.  
 PEACOCK.

in order that he may then appear and support his rights. My attention has often been called to the point, and I have no doubt that it is unnecessary to state, on the face of a stop order, that it was made without prejudice.

Jan. 15, 16.  
 March 5.

*In re* SMITH.

*Ex parte* HUSBAND.

Where the taxing-master has received no special directions from the Court, in regard to payments made by a client to his solicitor, it is his duty to confine himself to simple payments plainly proved to have been made on account of the bill of costs.

In ascertaining what is due on bills of costs, and in the consideration of what payments have been made on account of them, questions of law and fact of considerable difficulty may

THIS case is reported *ante* (a), on which occasion it appears, that, on the 4th of August 1841, the Court directed the taxation of Mr. G. Smith's bills against Mr. Husband, a country solicitor. The bills, amounting to 9176*l.* 6*s.* 8*d.*, were taxed at 8751*l.* 17*s.* 10*d.*, and a sum of 2832*l.* 5*s.* 3*d.*, was found due to Mr. Smith.

Mr. Husband presented a petition for liberty to except to this report. The grounds on which he relied are stated in the judgment of the Court, it is therefore unnecessary to repeat them here.

Mr. G. Turner and Mr. Cole, in support of the petition, cited *Thompson v. Percival* (b), and *Oakeley v. Pasheller*. (c)

Mr. Kindersley and Mr. W. T. S. Daniel, *contra*.

Mr. Turner in reply.

(a) 4 Beavan, 309.

(b) 5 Barn. & Ad. 925.

(c) 10 Bl. 548.

*The*

and may possibly justify and require discussion and determination, even in jurisdiction exercised by the Court on petitions for taxation.

*The MASTER of the ROLLS* reserved judgment.

1846.  
In re SMITH.

*The MASTER of the ROLLS.*

March 5.

Mr. *Smith* was, for several years, the *London* agent of Mr. *Husband*, a country solicitor, and, on the 4th day of August 1841, an order was made (a), by which it was referred to the Master to tax all the bills of Mr. *Smith*, and ascertain the amount which was due to him thereon, having regard to the sums of money which had been paid, by or on behalf of *Husband*, to *Smith* or any person on his account or for his use, on account of the bills, or received by him as agent on account of the bills.

In the petition on which this order was obtained, Mr. *Husband* had claimed to have an account of the pecuniary transactions between him and Mr. *Smith*; and this part of the petition having been refused, the order was so framed, as to exclude any account of payments not made on account of the bills.

The Taxing Master, by his certificate dated the 14th of July 1845, certified, that Mr. *Smith's* bills, amounting to 9176*l.* 6*s.* 8*d.* had been laid before him, and that he had taxed the same at the sum of 8751*l.* 17*s.* 10*d.*, and that, having regard to the sums of money paid by or on behalf of *Husband* to *Smith*, or any person on his account or for his use, on account of the bills, he found, that there was due to *Smith* on the bills the sum of 2832*l.* 5*s.* 3*d.*

Mr. *Husband* has presented a petition, praying that he may be at liberty to file exceptions to this report on several

(a) See 4 *Beavan*, 316.

1846.  
In re SMITH.

several grounds, which, in the argument, have been reduced to three:—

1. The disallowance of a sum of 500*l.*, alleged to have been made to *Malachi* for *Smith* on account of the bills.
2. The disallowance of the sum of 500*l.*, alleged to have become due from *Smith* to *Husband* on the sale of certain mining shares, the price of which *Smith* agreed to accept on account of his bills.
3. The non-taxation of certain bills, some of which had been taxed in bankruptcy, and all of which had been paid by the clients to *Husband*.

The first observation to be made on the case is, that the sums of 500*l.* each, amounting together to the sum of 1000*l.*, were part of the Petitioner's complaint on his first petition, in which it was stated, that *Smith* omitted to credit him, in account, with the sum of 1000*l.*, for which he ought to have been credited in 1835, and for which the Petitioner held *Smith's* receipt, under his own hand, dated the 5th *August* 1835.

The petition in which this statement was made, contained no allegation, that *Smith* had agreed to give credit for this sum of 1000*l.*, as against his bills of costs. The relief which was sought in respect of this sum of 1000*l.* was endeavoured to be obtained on the taking of a general account, which I thought, and still think, I had no authority to direct on such a petition, and the order was made, that the Master should have regard only to such sums as were paid on account of the bills.

To meet the terms of the order, this petition states, that, at the time of the transaction in respect of which  
this

this claim arises, *Smith*, in the presence of the Petitioner and *Malachi*, made an entry in a book, crediting the Petitioner for the sum of 1000*l.* as against the bills of costs, but the affidavit made by Mr. *Husband*, in speaking of the entry, omits the words "as against the bill of costs."

1846.  
In re SMITH.

*Smith*, on the other hand, insists, that the whole transaction as to the mining shares was fraudulent and void; that the sum of 500*l.*, alleged to have been paid to *Malachi*, was, in fact, never paid; that he never agreed that the sum of 500*l.*, part of the price of the shares purported to be purchased from *Husband*, should be credited against his bill of costs, and that therefore the Master was quite right in not allowing those sums.

Notwithstanding the great importance of keeping the jurisdiction of the Court, in cases of this kind, within its proper limits, and the propriety of directing the Master to have regard only to sums paid on account of the bills, in ascertaining what is due in respect of them, it is not improbable, that in the consideration of what payments have been made on account of the bills, questions of law and fact of considerable difficulty may incidentally arise, and may possibly justify, and even require discussion and determination, even in this jurisdiction. When such questions properly arise, it may be the duty of the Court to avail itself of all the means which it possesses, to have them investigated and settled, according to law and justice. But in a case where the Master has received no special directions from the Court, I think that it is his duty to confine himself to simple payments, plainly proved to have been made on account of the bills, and that he would not be authorized to allow, as against bills of costs, sums of money not plainly appearing



1846. *In re SMITH.* ing to be such payments. Upon a conflict of evidence he might have to certify whether such a payment had been made or not; but without special directions, I think, that he could not take upon himself to certify whether a certain alleged transaction, not being an actual payment, and the nature and circumstances of which were disputed, was or was not such a transaction as a court of law or equity would, under the special circumstances, have adjudged or decreed to constitute debt or payment.

And in this case, considering the form and manner in which the Petitioner's claim to these two sums of 500*l.* each was alleged and disposed of on his first petition, and the want of any explanation of the circumstances, under which he now seeks to establish his claim on a different footing; considering the form of the order, directing the Master to have regard to sums of money paid on account of the bills, and the absence of all special directions as to the claim to these sums contained in the petition; and, further, having carefully examined the evidence in support of the claim to the sum of 500*l.*, which is alleged to have been actually paid, and of the claim to the other sum of 500*l.*, which it is alleged ought to be deemed to have been paid, I am of opinion, that the Master has properly disallowed these sums, and that, in respect of them, there is no ground for giving the Petitioner leave to except to his report.

I am further of opinion, that the charge made in this petition, that the Master has not fully taxed all the bills which he was ordered to tax, is without any just foundation. All the bills not previously taxed or paid were fully taxed; as to the others, Mr. *Smith* was called upon to

to prove his alleged disbursements, and I find no allegation of specific errors.

1846.

*In re SMITH.*

On the whole, therefore, I am of opinion, that this petition must be dismissed with costs.

*In re BEDSON and RUSHTON.*

Jan. 14.

March 20.

**T**HIS was a petition praying that the Petitioner might be at liberty to except to the certificate of the Taxing Master, who had allowed to the solicitor certain charges of which the Petitioner complained. The particulars are stated in the judgment of the Court.

Mr. Kindersley and Mr. Craig, in support of the petition.

Mr. Turner and Mr. Prior, *contra*.

Mr. Kindersley, in reply.

The MASTER of the ROLLS said, he thought it necessary to make some inquiries before he decided the points argued.

An order was made for the division and transfer of a fund in Court, but before it could be completed, the fund became altered, and the solicitor presented a petition for a similar object. Held, that it could not be considered as unnecessary, it appearing that the solicitor, using his best exertions, was unable to act on the first order, by reason of a difficulty as to the legacy duty; the solicitor was

The therefore allowed the costs upon taxation.

Expedition money, paid by a solicitor to a stationer or writing clerk employed in the Registrar's office, disallowed upon taxation.

A gratuity paid to the clerks of the Accountant-General's office was disallowed to the solicitor on taxation, as was also a fee paid upon bespeaking an order for transfer which could not be made available.

1846.

*The MASTER of the ROLLS.*

*In re* BEDSON  
and  
RUSHTON.

March 20.

The first subject of complaint consists of several items, amounting in the whole to 3*l.* 13*s.* 3*d.*, for business done, as the Petitioner alleges, on account of one *Hugh Brown*, but which the Master has allowed, as if the business had been done on account of the Petitioner. On consideration of the affidavits, I am of opinion, that the business was, in fact, done for the accommodation and benefit, and on the account of the Petitioner, in the transaction of his business, and that there is no ground for exception to the Master's certificate in that respect.

The next subject of complaint consists of the costs of a petition, upon which an order was made, by the Vice-Chancellor *Wigram*, for the apportionment, payment, transfer, and carrying over of the funds in the cause.

By the order made on further directions in the year 1843, directions were given for apportioning the funds amongst the parties interested, and for transferring, paying, and carrying over the apportioned shares.

The Master's report was made on the 23d day of *November* 1845. The apportioned shares were not transferred and carried over pursuant to the order on further directions; but, on the 7th of *January* 1846, and in respect of the accruer of dividends, which would require a new apportionment, a petition was presented, and a new order obtained for the division, transferring, and carrying over of the funds as altered.

This is the petition complained of, and it is represented to have been entirely unnecessary and improper. In the absence of any explanation, it seems, that the  
solicitor

solicitor might and ought to have procured the necessary transfers and carrying over to be made under the order on further directions, immediately after the report of apportionment was made. Neglect in acting upon such orders, has been a frequent occasion of unnecessary expense, and if no explanation had been given, I might, in this case, have thought it right to disallow the costs incurred.

1846.  
J<sup>re</sup> BEDSON  
and  
RUSHTON.

But it appears, that the solicitor, using his best exertions, was, by reason of a difficulty which occurred in ascertaining the amount of legacy duty payable, unable to act upon the order on further directions till the fund had been altered, and after considering the circumstances stated in the affidavits, I cannot venture to say, either that the petition was unnecessary, or that it could have been avoided by any diligence of the solicitor. I am therefore of opinion, that the Master's certificate ought not to be disturbed on this ground.

But there are three other items, which I think ought not to be allowed.

One is a sum of 10s. paid, as it is said, for expedition to a stationer or writing clerk employed in the Registrar's office.

Another is a sum of 3*l.* 3*s.*, paid to the clerks in the office of the Accountant-General, not for a specific or stated reason, and which I therefore understand to have been paid as a gratuity. Such payments are stated to be customary. I find them mentioned in the Report of the Fee Commissioners in 1816 (*a*), and the nature of them, and the circumstances under which they have been

1846.  
  
*In re* BEDSON  
 and  
 RUSHTON.

been paid are explained by Mr. *Seth Ward*, in his evidence given before the Chancery Commissioners in 1825. (a) In the Report of the Commissioners in 1826, it was recommended that such gratuities should be abolished, but no order was made in pursuance of that recommendation; and in 1830, the clerks of the Accountant-General, in their return to an order of the House of Commons, included gratuities amongst the sums which they had received. It is therefore true, as alleged, that it has been customary to make such payments, and also that there has been no concealment of the fact. The practice has been under consideration, and has not been forbidden.

It is the obligation to pay them which is now disputed, and I have been informed, that, upon the taxation of costs whilst the duty was performed under the directions of the Master in Ordinary, there was no settled rule on the subject. Some Masters allowed them, others disallowed them when opposed, but not otherwise, and others refused to allow them at all. Moreover, it does not appear that any such gratuities have ever been claimed as a right, or that the solicitors who have declined to pay them, (of which there have been some), have ever been held to be, on that account, the less entitled to have their business regularly despatched, with due promptitude. Nonpayment, on one occasion, has not induced any neglect or delay on that or any future occasion, and under such circumstances, payment cannot be considered as a necessary expense incurred by the solicitor for the promotion of the client's business. Under these circumstances, and in the absence of any express authority, and having regard to the principle which I think ought to govern such matters, I am of opinion

(a) *App. A.* pp. 472, 473.

opinion that the client was under no necessity to pay the sum of 3*l.* 3*s.*, and without deciding more than this particular case requires me to do, I must hold that this charge is not to be allowed.

1846.  
In re BEDSON  
and  
RUSHTON.

The remaining item amounts to 11*s.* The solicitor, intending to procure two transfers to be made, pursuant to the order on further directions, paid for them, and for the usual directions the different sums, making together 11*s.* In consequence of the delay, arising from the difficulty which occurred about the legacy duty, he was unable to procure the transfers to be made in time, and the expense was lost. Accused as he is of delay, it appears that his zeal and diligence led him into this expense, which, in the event, proved to be fruitless. It seems hard upon him, but I think that the client is not bound to repay him the money so uselessly expended.

I am, on the whole, of opinion, that the Master should review his certificate as to the three items of 10*s.*, 3*l.* 3*s.*, and 11*s.*, but not as to any of the other charges complained of in this petition.

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NOTE.—The 3 & 4 W. 4. c. 94., after making a provision as to the fees to be received by the Masters' clerks, and the Registrars and their clerks (s. 37.), and by the Master of reports and entries (s. 8.), by the s. 41. imposes a penalty of 500*l.* and other severe penalties &c., upon any Master in ordinary or "any person holding any office, situation, or employment in any office of the said Court," who shall receive "any fee, gift, gratuity, emolument, or any thing of value," "other than what is allowed or directed to be taken by him as aforesaid." The words have not hitherto been held to be applicable to officers whose duties are not regulated by the act.

1845.



Dec. 15.

1846.

March 2.

## HITCHCOCK v. JAQUES.

An order of course to amend by adding parties, obtained after replication, is irregular.

**T**HE bill was filed on the 18th of *April* 1844, and *Jaques* filed his answer on the 22d of *July* following. He thereby took an objection for want of parties, but which was not set down for argument. The other three Defendants filed their answer on the 23d of *April* 1845, and on the 15th of *June* 1845, the Plaintiff filed a replication.

Afterwards, and on the 3d of *December* 1845, the Plaintiffs obtained an order of course at the Rolls, for "liberty to amend their bill by adding parties Defendants, with apt words to charge them, without costs, amending the present Defendants' office copies and not requiring any further answer from them."

The Defendant *Jaques* now moved to discharge the order for irregularity.

Mr. *Dickinson*, in support of the motion. The practice as to amendments is now regulated by the 65th, 66th, and 68th Orders of *May* 1845. (a) By the 65th, an order of course may be had, at any time, to amend clerical errors in names, &c.; under the 66th Order, the Plaintiff may obtain one order of course to amend before replication, but the Order then proceeds negatively, and prohibits any further order of course to amend, except in the case provided for by the 65th Order. The 68th Order applies to special orders after replication, which are required to be supported

(a) *Ordines Can.* 308.

supported by certain affidavits. None of these warrant the order complained of.

1845.  
HITCHCOCK  
v.  
JAQUES.

The answer raises the objection for want of parties, and, by the Plaintiff's neglect to set it down for argument, he was not to be at liberty, as of course, to obtain an order to amend his bill by adding parties. (a) He cannot be permitted to evade the 39th General Order by an amendment after replication.

Mr. Turner and Mr. Tennant, *contra*.

The orders to amend which are contemplated by the General Orders of 1845 are orders to amend against a particular Defendant, or by which he may be affected, and not an order for making new Defendants and requiring no further answer from the old. It was held in *Brattle v. Waterman* (b), that, notwithstanding the 15th Order of 1828 (c), a Plaintiff might, after replication, obtain an order of course to amend by adding parties only. The Orders of 1845 are not more stringent than the 15th Order of 1828, and ought to receive a similar construction, unless it appeared that it was intended to alter the old rule.

The 39th Order applies only to amendments at the hearing, before which time the Defendant might, at any time, remove an objection for want of parties by amendment.

Mr. Dickinson, in reply. The practice was in uncertainty previous to the Orders of 1845: that uncertainty has been removed by those Orders. All amendments of a bill are amendments as against all and every Defendant;

(a) 39th Order of August 1841. Ord. Can. 175.

(b) 4 Simons, 125.

(c) Ord. Can. 10.



1846.  
  
 HITCHCOCK  
 v.  
 JAKUES.

fendant; and it could be shewn in this case, that the issues have been altered by this very amendment, if the Defendant were permitted to go into merits. On this occasion that cannot be done, as the cause is attached to another branch of the Court.

*The MASTER of the ROLLS* said he would consider the question.

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*March 2.*

*The MASTER of the ROLLS* considered the order irregular, and granted the application, but without costs.

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*Jan. 31.*  
*Feb. 25.*  
*April 23.*

#### THOMAS v. SELBY

Whether the Court can order substituted service of a copy bill under the 23rd Order of August 1841, *quære.*

**M**R. *WELFORD* applied for an order to substitute service of a copy bill (*a*) upon a wife, for a husband who had deserted her. It was stated that the husband and wife had been made parties in respect of the separate property of the wife.

*The MASTER of the ROLLS.* Is there any precedent for substituting service of a copy bill?

*Mr. Welford.* The proceeding is analogous to that of personal service of a subpœna.

*The MASTER of the ROLLS.* But the General Order does not provide for such a case. Hand up the papers and I will read them.

*The*

(*a*) 23rd Order of August 1841, Ord. Can. 171.

25. *The MASTER of the ROLLS.*

1846.

THOMAS  
v.  
SELBY.

There is a difference of opinion on the point, and I cannot make the order. The better way will be to pray a *subpœna*, and you may then proceed with greater security.

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This being accordingly done,

Mr. *Welford* now applied for an order for substituted service of the *subpœna* on the wife for her husband. It appeared that the husband had left his wife in *October* 1844, and had never since been seen or heard of.

*April* 23.

*The MASTER of the ROLLS* considered that this was not a proper case for substituting service.

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HALDENBY v. SPOFFORTH.

*Jan.* 26.

*April* 16.

**R.** *SPOFFORTH* was a defaulting trustee and executor. He died, and administration was taken out to him, and his representatives were made parties to this suit. The assets of *R. Spofforth* were insufficient to repair the breach of trust, and the question was, whether his administrators were entitled to their costs as part of the expenses of the administration.

The representative of a defaulting executor, fairly accounting, is entitled to deduct his costs of suit out of the assets, though they may be insufficient to repair the breach of trust.

It was argued, that the administrators were in the position of the intestate, and, like him, could receive nothing until they had repaired the breach of trust. It was said that the point had been decided.

O 2

Mr.

1846. *Mr. Kindersley, Mr. Purvis, Mr. Rasch, and Mr. Tilton, for different parties.*

*Haldenby*  
v.  
*Spoofforth.*

*The MASTER of the ROLLS* said he would make inquiries.

*April 16.* *The MASTER of the ROLLS* held that the representative, fairly accounting, was entitled to deduct his costs of suit out of the assets.

1847:  
*Jan. 28.*  
*Feb. 8.*

### FORMAN v. GRAY.

A Plaintiff, having one of the Defendants under his control, kept back his answer. Another Defendant put in his answer, and after great delay on the part of the Plaintiff, moved to dismiss for want of prosecution. The Plaintiff, to defeat the motion, obtained an order, of course, to amend. Held, that as there was an answer outstanding, the order to amend could not be considered "irregular;" but it was afterwards discharged on other grounds. *See next case.*

ON the 23d of *July 1845*, the bill was filed by the wife of *Charles Forman*, by her next friend, against her husband and other Defendants.

On the 16th of *December 1845*, *William Gover Gray* filed his answer; and on the 30th of *April 1846*, the Plaintiff obtained an order for the production of papers, which had not now been drawn up.

On the 1st of *June 1846*, *Charles Forman*, the Plaintiff's husband, entered an appearance by *Mr. Robins*, the Plaintiff's solicitor, but he had not put in his answer.

On the 17th of *December 1846*, *William Gover Gray* gave notice, for the 21st of *December*, of a motion to dismiss the bill for want of prosecution; but the Plaintiff, on the 21st of *December* (the Defendant *Charles Forman* not having answered), obtained and served an order of course to amend his bill, being the first order of course obtained for that purpose.

The

The motion to dismiss afterwards came on, but being intercepted by the order to amend, the Plaintiff submitted to pay the costs, and no other order was made.

1847.

FORMAN  
v.  
GRAY.

Mr. Elderton now moved to discharge the order to amend "for irregularity." He argued, that the order to amend had been obtained in fraud of the General Orders; that the Defendant had been perfectly regular in his motion to dismiss for want of prosecution, *Dalton v. Hayter (a)*; and on that motion it would have been no answer to say, that there was a Defendant whose answer had not been got in, unless it could be shewn that due diligence had been used in attempting to obtain it; *Stinton v. Taylor. (b)* That although the General Orders permitted a party to obtain an order to amend, within four weeks after the last of several answers was to be deemed sufficient, yet this order must have reference to a *bonâ fide*, and not to a "pocket Defendant" under the control of the Plaintiff. That after so great a delay, it was a fraud on the Defendant to obtain an order of course, for no other purpose than to defeat his motion to dismiss for want of prosecution.

Mr. Heathfield *contrâ*. The case of *Dalton v. Hayter* is a distinct authority, that the order to amend is perfectly regular. There, it is said, "The expressions 'the last answer' and 'the last of several answers' in Order 66. (c) and 16., art. 33. (d), clearly mean the last of the several answers filed by several Defendants, or by more than one Defendant; and pending the time appointed by these Orders, as affected by Order 14. (e), the Plaintiff is entitled to obtain an order to amend." When the Plaintiff

(a) 7 Beavan, 586.

(d) Ord. Can. 287.

(b) 4 Hare, 608.

(e) Ord. Can. 276.

(c) Ord. Can. 308.

1847.

  
FORMAN  
v.  
GRAY.

Plaintiff obtains an order to amend within the time expressly and distinctly limited by the General Orders of the Court, then, whatever may be its effect as to the other proceedings in the cause, it is impossible to say that it is *irregular*.

He also cited *Lester v. Archdale* (a), and *Peacock v. Sievier* (b), in which it was held, that an order to amend obtained after notice of a motion to dismiss is an answer to the motion.

*The MASTER of the ROLLS* ordered the motion to stand over, to give the Plaintiff an opportunity of explaining the delay.

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*Feb. 8.* An affidavit was made, but it did not afford any satisfactory explanation of the delay.

Mr. *Elderton* renewed his motion.

Mr. *Heathfield*, *contra*.

Mr. *Elderton*, in reply.

*The MASTER of the ROLLS.*

Although the delay has been so gross and without excuse, I cannot make the order which is now asked.

It is asked to discharge this order to amend, "for irregularity." Now the General Orders say, that within a certain time after the answer of the last Defendant is to be deemed sufficient, the Plaintiff is to be at liberty to

(a) *Antè*, 156.

(b) *5 Simons*, 553.

to obtain an order of course to amend his bill, and here the last Defendant has not answered. Irregularity is therefore out of the question. That there has been a gross abuse of the proceedings no one can doubt, for the Plaintiff has had it in her own power to determine the limit of time for obtaining the order to amend. The bill was filed on the 23d of *July* 1845; the answer of the last of all of the Defendants, except of the Defendant who is in the power of the Plaintiff, was filed on the 16th of *December* 1845, and was to be deemed sufficient on the 10th of *February* 1846. Observe the situation in which the parties were; on the 16th of *December*, all the answers had been put in, except that in the power of the Plaintiff; the Plaintiff does nothing until *April* 1846, when she makes a motion for the production of papers, which, it is said, has never yet been drawn up. At the end of a full year after his answer had been filed, *William Gover Gray* gave notice of motion to dismiss the bill for want of prosecution. The motion is met by an order of course to amend. There is no pretence for obtaining leave to amend, except that Mr. *Forman* has not answered; but that does not make the order irregular. The abuse may be such as to render it necessary to make a General Order for the purpose of preventing it (*a*), but I cannot say that it is irregular.

I cannot grant the motion, but I shall refuse it without costs.

(*a*) See the General Order of the 13th *April* 1847.

1847.  
FORMAN  
v.  
GRAY.



1847.

March 23.

FORMAN v. GRAY.

Under the General Orders, any Defendant is entitled to move to dismiss for want of prosecution, after the expiration of six weeks from the time when his answer is to be deemed sufficient. Upon such a motion, all unavoidable and all just and reasonable causes of delay may be considered, and in the cautious exercise of its discretion, the Court may grant or refuse to grant any further time the Plaintiff may require.

An order of course, though obtained within the time limited by the General Orders, dis-

charged, on the ground of the inexcusable delay of the Plaintiff, in proceeding and getting in the answer of a Defendant under her control, and because it had been obtained for the purpose of defeating a motion to dismiss for want of prosecution.

The expressions "last answer" and "the last of several answers" in the General Orders regulating the period within which a Plaintiff may obtain an order of course to amend, mean the last answer required in the then state of the record.

THE former application of the Defendant *William Gover Gray* having been refused, it was now moved to discharge the order of course to amend, to take the amended bill off the file, and to dismiss the original bill for want of prosecution; the notice of motion omitted that the ground of the motion was "for irregularity."

Mr. *Elderton*, in support of the motion.

Mr. *Heathfield*, *contra*, in addition to his former argument, said, that there was no danger of any abuse of the General Orders, as the Plaintiff was restricted to one order of course to amend, and that the production of such an order in answer to a motion to dismiss could not, therefore, be repeated. That the former motion had been refused on the ground that the order was not irregular, and that therefore this motion, which was for the same object, ought not to succeed. On the motion to dismiss, the Defendant got his costs; if he had intended to dispute the regularity of the order to amend, he ought to have asked that the motion might stand over.

The MASTER of the ROLLS reserved judgment.

The

123. *The MASTER of the ROLLS.*

1847.

FORMAN  
v.  
GRAY.

In this case, the Defendant *William Gover Gray* put in his answer on the 16th of *December* 1845. The six weeks, at the end of which the answer was to be deemed sufficient, and the further time of four weeks, within which the Plaintiff was at liberty to amend, expired before the middle of *March* 1846.

The Plaintiff is a married woman, suing by her next friend. Her husband, one of the Defendants, appeared by the Plaintiff's solicitor; but did not, and has not yet, put in his answer.

On the 17th of *December* 1846, the Defendant *William Gover Gray*, who had for many months been entitled to move to dismiss the bill for want of prosecution, gave notice of his intention to move for that purpose on the 21st of *December* 1846.

On that day, and before the motion to dismiss could be made, the Plaintiff obtained an order of course for leave to amend the bill. She produced this order for the purpose of shewing that an order to dismiss should not be made.

The Defendant, *William Gover Gray*, moved to discharge the order to amend "for irregularity."

If I could have construed the expression "last answer" and "last of several answers," in Order 66. Order 16. art. 33., to mean the last answer actually filed at the time of moving to dismiss, the order of amendment would have been irregular, because made long after the expiration of the time to amend, if reckoned from the time of filing the answer last put in.

But



1847.

FORMAN

v.

GRAY.

But it appeared that there was an answer still outstanding, and the last answer required by the Plaintiff's bill not having been filed, it seemed to me, that the order to amend, though obtained after gross and inexcusable delay, was not, in strictness, irregular. It has been supposed, that I expressed a contrary opinion in *Dalton v. Hayter* (a); but it is quite otherwise, as, in that case, I stopped the counsel who was arguing against the point raised on the other side, that the "last answer," in the order referred to, meant the last answer actually filed at the time of moving to dismiss; and all the expressions used in the judgment with respect to the "last answer filed," must have reference, as I intended, to the filing of the last answer required in the then state of the record.

The Defendant's motion to discharge the Order of course to amend "for irregularity" having been refused, he now moves that the order may be discharged, on the ground that it was obtained only for the purpose of delay, and in evasion of the plain intent of the Orders of May 1845.

In considering orders of course obtained at the Rolls in causes attached to other branches of the Court, there has been occasion to observe upon the importance of distinguishing orders properly called irregular, which may and ought to be disposed of here, from orders not strictly irregular, but which ought not to have been obtained, by reason of merits or of the conduct of parties in the cause, which can be properly considered and disposed of only by the Lord Chancellor, or in the Courts to which the causes belong, and are not within the jurisdiction of this Court. To avoid the assumption  
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(a) 7 *Beavan*, p. 589.

of any such jurisdiction, I have endeavoured to avoid interfering, except in cases properly and strictly called irregular, and not to give to the word "irregularity" any such extended meaning, as would draw into this Court the consideration of the conduct of parties in the prosecution of causes not within its jurisdiction.

1847.

FORMAN  
v.  
GRAY.

The present is a Rolls' cause, and if the Defendant's former motion had been to discharge the order to amend, without founding it solely on the alleged irregularity, I should have had to consider the question raised on the present motion.

Under the Orders, any Defendant is entitled to move to dismiss the bill, after the expiration of four weeks from the time when his answer is deemed to be sufficient.

The circumstances of the case may be such, that, although the Defendant is entitled to move to dismiss, and the Plaintiff is not in a condition to take the next step in the cause, the Court may not think fit to Order the bill to be dismissed.

The Plaintiff may not have been able, with his utmost diligence, to proceed effectually against other Defendants, or to obtain some answer which he may require; he may be so circumstanced as not to be able to obtain justice without amending his bill, and not able to amend effectually without an allowance of time. On the motion to dismiss, all unavoidable and all just and reasonable causes of delay may be considered; and in the cautious exercise of its discretion, the Court may grant, or refuse to grant, the time which the Plaintiff may require. But the grant of further time is what is called an indulgence; and as it cannot be granted without interfering with the Defendant's right to dismiss, the Court

1847.

  
FORMAN  
v.  
GRAY.

Court has to consider, what have been and are the causes of delay, what is due to the justice of the case, and what may be the relative inconveniences which may probably arise from the grant or refusal of the time asked for, and what, if any, terms ought to be imposed on the Plaintiff, if time be given to him.

In the present case, it appears to me, upon the facts stated in the affidavits, that the Plaintiff has not given any satisfactory reason for her delay, or shewn any title to indulgence.

I think that it is contrary to the intention of the Orders, that the Plaintiff, after delaying so long as to entitle a Defendant to move to dismiss, should directly or indirectly obtain further time without the leave of the Court, or without a consideration of the causes of delay, and of what may be due to justice, under the circumstances of the case; and I think that it would be contrary to the intention of the Orders, if the Plaintiff were, in effect, to obtain time against one Defendant, by wilfully withholding the answer of another Defendant who is acting under his influence; and such time would be obtained, if the right to amend, by order of course, could be acted upon, after a notice of motion, duly served, to dismiss the bill, and if the order, obtained as of course, could be employed to defeat the notice to dismiss, in a case where the Plaintiff has wilfully, or for his own convenience, or by mere neglect, omitted to obtain the answer of another Defendant, and has no excuse for the delay, which entitled the Defendant who applies to move to dismiss.

The Defendant, being entitled to move to dismiss, is, I think, entitled to say, that further time is not to be given to the Plaintiff without some reason being assigned

signed for it. It is no reason for her to say, that an order of course has been obtained to amend the bill, in a case in which it appears that the right to amend is founded on the want of an answer, which, but for the inexcusable neglect and delay of the Plaintiff might have been long since filed.

1847.  
FORMAN  
v.  
GRAY.

It may be proper to prevent orders of course to amend, after due service of notices of motion to dismiss (a); but the question here depends on the conduct of the Plaintiff in the prosecution of the suit; and in the present state of the Orders, it is not, in my opinion, a mere question of regularity or irregularity.

The Plaintiff, acting on her supposed right to obtain an order of course to amend, produced it in opposition to the motion. She might, without actually obtaining the order, have claimed a right to it, or might have asked for time, on just grounds, if any there had been. If she had done so, her case would have been considered; but, from the evidence now adduced, it would have appeared, that she was not entitled to any allowance of further time; and I am of opinion that she ought not to be allowed, by means of an order of course to amend obtained under such circumstances, to obtain an indulgence, which would have been refused if asked for upon a true statement of the facts.

I think I ought to discharge the order on this motion on the ground on which it is made.

If the Plaintiff will undertake to get in the remaining answer to the original bill, and file a replication within a week, that bill may be retained.

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(a) See the General Order of April 1847, *antè*, p. vii.

1847.

FORMAN  
v.  
GRAY.

The order to amend was accordingly discharged with costs, and the amended bill (there having been a new engrossment), was ordered to be taken off the file.

March 23.

ARNOLD v. ARNOLD.

On a motion to discharge an order of course to amend, in a cause attached to another branch of the Court, the M. R. has not jurisdiction to take into his consideration the conduct of the parties, and will only determine whether the order has been regularly obtained.

An order of course to amend, obtained while an answer is outstanding, is not "irregular," though, under the circumstances, it may have been improperly obtained.

THIS cause was attached to the Court of the Vice-Chancellor *Wigram*. The bill was filed on the 23rd of *July* 1846, and several of the Defendants who had put in their answers in *December* 1846, recently gave notice to dismiss the bill for want of prosecution. There being other Defendants who had not appeared, the Plaintiff, after service of the notice of motion to dismiss, obtained, at the Rolls, an order of course to amend. The motion to dismiss having come on before the Vice-Chancellor *Wigram*, his Honour thought, that the order to amend prevented an order to dismiss, and he directed the motion to stand over, with liberty to apply to this Court to discharge the order to amend.

*Mr. Hare* now moved to discharge the order "for irregularity." He cited a case, *Myers v. Wetherall*, before Vice-Chancellor *Wigram*. (a)

*The MASTER of the ROLLS.*

The cause is attached to another branch of the Court; I have therefore no right to look at the merits or conduct

(a) Unreported.

duct of the parties. My impression is, that this order was not properly obtained; but I cannot say it is "irregular."

1847.  
ARNOLD  
v.  
ARNOLD.

Mr. Elderton, *contra*, contended that the Order was not, in strictness, irregular, and that the cause being attached to another branch of the Court, the Master of the Rolls could not look at the merits, or consider the conduct, of the parties.

Mr. Hare, in reply.

*The MASTER of the ROLLS.*

In considering the regularity of this order, I ought to abstain from taking into my consideration the conduct of the parties, because the cause is ascribed to his Honour Sir J. Wigram. (a)

If I thought that the words "the answer or the last of several answers" were not to be considered as meaning the last answer of several Defendants, but the last answer then put in, then this order to amend might be considered to have been irregularly obtained; but neither the words nor the meaning of the General Orders (b) are such; and, in some cases, great injustice might result from so holding, for a Plaintiff might, without any default of his own, be unable to complete his case, and yet have his bill dismissed for want of prosecution.

It

(a) See the 6th Order of the 9th May 1839, *Ord. Can.* 137. *Robinson v. Milner*, 5 *Beav.* 49. *Hooper v. Paver*, 6 *Beav.* 173. *St. Victor v. Devereux*, *ib.* 584. *The Marquis of Hertford v. Suisse*, 7 *Beav.* 160. *Plomer v. Macdonald*, 8 *Beav.* 191. *Holcombe v. Antrobus*, *ib.* 405. *Wool v. Townley*, *antè*, p. 41., and *Forman v. Gray*, *antè*, p. 196. 200.

(b) *Ord. Can.* 308.

1847.

ARNOLD  
v.  
ARNOLD.

It appears to me, that when the Plaintiff desires leave to amend, pending a motion to dismiss for want of prosecution, the application ought not to be as of course, but that the circumstances ought to be brought before the Court to see whether they justify it. (a)

I cannot grant this motion ; but I may observe, that it might be perfectly right for me to refuse it, and yet be equally right for the Lord Chancellor to grant it ; for he can look into the merits which I have no jurisdiction to do. I should feel most anxious to afford every facility in discharging this order, founded on the opinion of Vice-Chancellor *Wigram* on the merits, if I could do it.

(a) See the General Order of the 13th *April* 1847.]

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NOTE.—The case was taken before the Lord Chancellor by way of appeal, and was affirmed by him on the 8th of *May* 1847.

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# REPORTS

OF

## CASES

ARGUED AND DETERMINED

1846.

IN

THE ROLLS COURT.

*In re* BLAKE AND YOUNG.

March 11.

**A**N order had been obtained "in the matter," and not in a cause, for the taxation of the bill of costs of Messrs. *Blake* and *Young*, and a sum of 195*l.* was, on taxation, found due from them to Mrs. *Miller* their client.

The 12th General Order of August, 1841, has reference only to orders in a cause, and is inapplicable to the four day order. *Semble.*

By an order dated the 8th day of *May* 1845, it was ordered, that Messrs. *Blake* and *Young* should pay the 195*l.* within a fortnight. Afterwards, on the 26th of *July*, the four day order was made, by which they were ordered to pay the amount in four days after personal service of the order, or in default to stand committed. (a) The order was served, but the solicitors made default in paying.

Mr.

(a) See *Seton*, 432.

VOL. IX.

P



1846.

*Re* BLAKE.

Mr. *Elderton* now moved, that the tipstaff should apprehend Messrs. *Blake* and *Young*, and bring them to the bar of the Court for not obeying the last order. He stated, that the four day order did not contain the indorsement required by the 12th amended order of *August* 1841 (*a*), and observed, that, though the expression in the 12th General Order of *August* 1841, "every order or decree," was very unlimited, still it was not applicable to the present case ; for the form of the indorsement was, that, on default, the party would be liable "to be arrested under a writ of attachment," or "by the serjeant-at-arms," which would be untrue in the present instance, where the penalty for nonpayment was, that the parties should stand committed and be liable to be arrested by tipstaff, and not upon an attachment or by the serjeant-at-arms.

*The MASTER of the ROLLS* said that no decision on the present occasion would help the applicant; but his impression was, that the Lord Chancellor had considered that the 12th General Order had reference only to orders in a cause, and to which the indorsement was applicable. (*b*)

He granted the application, and made the order for the tipstaff.

(*a*) *Ord. Can.* 167.

*Harc.* 97.; and *In re David Tay-*

(*b*) See *Lane v. Oliver*, 2 *lor, M. R.* 23d *Mar.* 1847.

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1846.

NELSON v. DUNCOMBE.

DUNCOMBE v. NELSON.

March 21.

April 20.

**T**HE question in these causes related to the right of Mr. *Duncombe* to retain, out of monies held by him in trust for Mr. *Nelson*, the amount expended for the protection and support of the latter during five years in a lunatic asylum (there having been no commission), and also the expenses of suing out a commission of lunacy at the end of that time, under which Mr. *Nelson* had been found to be of sound mind. The circumstances were as follows : —

It appeared, that Mr. *Nelson*, in the lifetime of his mother, had been considered to be of unsound mind, and, upon the usual medical certificates, he was, in March 1833, at his mother's request, placed in a lunatic asylum.

At the end of three months, however, he was discharged, and, in December in the same year 1833, his mother made her will, whereby she gave the residue of her

If a trustee be sued in Chancery for an account, and it appears that he has properly expended sums of money for the protection and safety, or for the maintenance and support, of his *cestui que trust*, at a time when he, though adult, was incapable of taking care of himself, the Court will allow him credit, in account, for such sums of money.

A bill may be filed in the name of a person alleged to be of unsound

mind, though not so found by inquisition, by any one professing to be his next friend ; and such a person may be sued as a Defendant, and the Court then appoints a guardian to answer for him. In such cases, the Court imposes all the restraints of infancy, and the party is bound by the acts of the guardian so appointed. The Court, having proper evidence that they are incapable of protecting their own interests, treats them as infants, or as insane, though not so found by inquisition ; and being satisfied that their next friend or guardian pays proper attention to their interests, and making all necessary inquiries to ascertain their rights, and what is beneficial to them, or, if necessary, directing that a commission may be applied for, ultimately deals with their rights and property as justice may require.

A contract may be implied, in favour of a person who has supplied a person of unsound mind though not so found by inquisition, with necessaries, or has provided him with proper protection and support, *semble*.

Jurisdiction of the Court to interfere for the protection of a lunatic not found so by inquisition.

An executor was allowed, under the circumstances, the costs of a cross cause for administration of the estate instituted by him against his *cestui que trust*.

1846.  
NELSON  
v.  
DUNCOMBE.

her property to Mr. *Nelson*, and appointed him sole executor. In *February* 1834, she made a codicil to her will, whereby she appointed Mr. *Duncombe* joint executor with her son. She died in *June* 1834, and her will was proved by *Duncombe* alone. In 1835, *Duncombe*, who had in his hand considerable sums of money, held in trust for *Nelson*, offered to account; but the latter took no notice of the offer, and seemed to have refused to have any communication with him.

In this state of things, and in *August* 1839, *Nelson* was taken before a police magistrate, on a charge of having threatened to kill or do some bodily harm to a medical gentleman, and he was ordered to find sureties to keep the peace. On his failing to do so, he was committed to prison; but the magistrate certified, "that he was much more fit for the protection of a lunatic asylum than a house of correction." Having no relation or friend, application was made to *Duncombe*, and it was suggested to him that *Nelson's* former malady had returned. *Duncombe* interfered and procured medical advice. He then applied to the magistrate by whom *Nelson* had been committed, and, upon the medical certificate required by law, and with the authority of the magistrate, he procured *Nelson* to be removed from the prison to a lunatic asylum, where the expenses of his maintenance, &c. were defrayed by *Duncombe*, out of monies in his hands belonging to *Nelson*. No commission of lunacy was applied for, and *Nelson* remained confined for upwards of five years. He escaped from the asylum in *September* 1844, and consulted his present solicitors. They obtained medical opinions, which stated the existence of a mild form of insanity, but that it would be improper again to place him in a lunatic asylum. The solicitors communicated the opinions to Mr. *Duncombe*, and they urged him to apply for a commission of lunacy, or ac-  
count

count and pay over the balance. Mr. *Duncombe*, however, declined to take out a commission, but stated his willingness to account to the parties who could give him a proper discharge.

1846.  
NELSON  
v.  
DUNCOMBE.

On the 11th of *November* 1844, *Nelson* filed his bill against *Duncombe* for an account of his mother's estate. A few days afterwards, *Duncombe* was informed by the Secretary of lunatics, that it had been reported that *Nelson* was a violent lunatic, and unsafe to be abroad, and that it was his duty to apply for a commission; and, in consequence, a further communication took place between the solicitors of the parties, and ultimately *Duncombe* consented to sue out a commission. *Duncombe* prosecuted the commission, and on the 22nd of *April* 1845, the jury found *Nelson* to be of sound mind. *Nelson* having refused to allow to *Duncombe* the money paid during his confinement, and all other payments made without his authority, *Duncombe*, on the 3d of *June* 1845, filed the second bill, praying a declaration of his right to the allowances, and that the allowance may be made on taking the accounts.

The evidence given by the keeper of the lunatic asylum, on the occasion of the execution of the commission, was proved in the cause, which tended to shew that the state of mind of *Nelson*, during the whole time he had been in confinement, had undergone no change.

The two causes now came on for hearing.

Mr. *Kindersley* and Mr. *Bates*, for Mr. *Nelson*, contended, that he was not liable to pay either the expenses incurred in the lunatic asylum, or those of the proceedings under the commission; for, as to the

1846.  
  
 NELSON  
 v.  
 DUNCOMBE.

first, the finding of the jury was conclusive as to his sanity at the time; and the evidence of the keeper of the lunatic establishment himself shewed, that he had been in the same state of mind from the time of his admission. It appeared, therefore, that Mr. *Nelson*, though of an excitable temper, was sane through the whole of the period; and consequently, that there was no direct obligation nor any implied contract, under which he could, at law, be considered liable. That it was not reasonable to expect, that the Plaintiff, who had been wrongfully subjected to coercion and imprisonment for five years, and had thus lost the enjoyment of the best period of his life, should consent to bear the expenses.

Secondly, as to the commission, they contended, that as the Defendant had failed therein, *Nelson* was not liable to pay the costs of the proceedings.

Thirdly, that the second suit had been unnecessarily instituted, and that *Duncombe* might have obtained, in the first suit, all the relief to which he was entitled.

Mr. *Turner* and Mr. *J. H. Taylor* for Mr. *Duncombe*.

There can be no doubt of the existence of the Plaintiff's insanity prior to the inquisition; that malady existed in his mother's life, when he was confined upon the usual medical certificates, and with his mother's concurrence. It recurred again after her death, when he threatened the life of her medical adviser. The Defendant, on that occasion, did not volunteer his interference, but being applied to, as the executor of the Plaintiff's mother and his only friend, at a time when the Plaintiff was imprisoned, he *bonâ fide* interfered for his protection. All was done from a proper and laudable

able motive, and according to the proper legal formalities. Medical certificates were obtained, and it must be assumed that the lunatic visitors performed their duty, and on their quarterly visitation inquired into his case.

1846.  
NELSON  
v.  
DUNCOMBE.

Where support and protection is *bonâ fide* afforded to a lunatic, the law implies a contract to pay out of his property: *Wentworth v. Tubb* (a), *Williams v. Wentworth* (b); see also *Selby v. Jackson* (c).

The same rule must apply where the insanity is partial, if the party be incompetent to protect himself; for the implication arises from the necessity of the case; and if it were otherwise, a person in a state of partial or temporary insanity might, though with ample means, be left abandoned, defenceless, and unprovided for. It is not, however, necessary to resort to that principle, for when a party is seeking equity, this Court will compel him to do it. This Court always throws its protection around persons incompetent to protect themselves, though not found lunatic by inquisition, and will apply any funds in Court or in the course of administration, belonging to such a person, in his support and protection. This was done by Lord *Eldon* in the case of *Sherwood v. Sanderson* (d). If the Defendant had applied to this Court at the time, a similar course would have been pursued, and he is equally entitled to have the benefit of the jurisdiction and the monies paid for the Plaintiff allowed in account, upon his satisfying the Court, upon an inquiry, if necessary, that the expenditure was, under the circumstances, necessary and proper.

As

(a) 1 Y. & C. (C.C.) 171., and (c) 6 Beavan, 192.  
2 Y. & C. (C.C.) 537. (d) 19 Ves. 280.  
(b) 5 Beavan, 325.

1846.  
  
 NELSON  
 v.  
 DUNCOMBE.

As to the commissiop, it was sued out at the instigation and suggestion of the Secretary of lunatics and of the solicitors of the Plaintiff, and for his benefit; the expense ought, therefore, to be allowed; besides which, there was an express agreement to pay them.

The cross bill was necessary in order to put in issue matters subsequent to the answer; without it, the Defendant's case could not have been properly brought before the Court.

Mr. Kindersley in reply.

*The MASTER of the ROLLS.*

This is a case too important in its consequences to be decided at the present moment. I must take an opportunity of looking into the cases, and especially of considering the judgment of Lord *Eldon* which has been cited to-day.

If one considers the case of this Plaintiff in its bare outline, a gentleman shut up in a lunatic asylum for five years, getting out of it only by stealth, and after his escape, found, upon a commission of lunacy, to be of sound mind, one cannot be surprised at his feeling a great indisposition to pay any of the expenses which have been occasioned. If such treatment had been the result of fraud or malice, or even of rashness, a greater offence could scarcely have been committed, than that of which he had been the victim.

But, on the other hand, consider this:— Here was a man without a relation in the world, who had, unfortunately, been in such a state of mind, that he was, by his mother, in her lifetime, placed under control and protection; after her death he was found committing  
 acts

acts of violence, and taken before a magistrate; he could find no bail, and a certificate was given, that he was much more fit for medical treatment than for punishment; upon this certificate it seemed proper that he should be taken care of in some fit place. Again, he had no relation in the world, and the only person known to, or in any way connected with him, was the executor of his mother's will, who had in his hands property belonging to him. In this state of distress, destitution, and liability to punishment, the executor *bonâ fide* interferes for his protection, relying on the proper constituted authorities for the due examination into his case from time to time, and it was upon or in consequence of their certificates, that the Plaintiff was continued in custody. Again, after his escape, it became necessary to examine into his case, even in the opinion of those persons who had then taken upon themselves to advise and protect him, so that, even then, his state of mind was such as to render a legal inquiry necessary. Upon that, a commission of lunacy issued, and it turned out, upon a full investigation, that he was, at the time of the inquisition (saying nothing of the past time) of sound mind. The question then is this, whether, in an account taken in this Court against that trustee, he is to be deprived of the expenses which he has *bonâ fide* paid, with a view to the protection of his *cestui que trust*.

1846.  
NELSON  
v.  
DUNCOMBE.

If he had been all the while of sound mind, there would, indeed, be no question at all about the matter. The whole of this would have been improper; but it is admitted that he was not always of sound mind, and that he had a tendency to insanity. He had committed a violence which was attributed to insanity, and before the commission was applied for there was the admission of his own agent that the matter was proper to be inquired into.

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1846.  
  
 NELSON  
 v.  
 DUNCOMBE.

Is he, then, to come and ask the assistance of this Court in getting the money from the executor of his mother, without making him any allowance for his outlay for his protection, and that on the ground that there is no debt? Consider for a moment what the state of any person in this unhappy predicament, without friends, relations, or any body but the trustee to take care of him, would be, if that trustee is to be told, "whatever acts of violence or insanity your *cestui que trust* may commit, if you interfere at all for his protection, either to shield him from punishment or any other consequences of his own acts, or for the safety of the public, you do it at your own peril, for not a farthing expended by you shall be allowed, unless you previously obtain the sanction of a Court of Equity, which alone has a right to administer the fund in your hands." It is hard to conceive that any state of things so shocking should exist.

Nevertheless, that does not determine the question as to the jurisdiction; and with regard to that, I shall look at the cases, for the purpose of seeing how far there is authority for its exercise. I agree that neither of the cases referred to, one in this Court, and the other before the Vice-Chancellor *Knight Bruce*, and the Lord Chancellor, answers this case; the other authority cited comes much nearer to it. If that case should not, from the *dicta* to be found in it, authorise the allowance in the present case, then the question will be, whether the general jurisdiction of this Court authorises it. This Court has not merely jurisdiction over the property, but it has also a special and parental jurisdiction, which it exercises, not only in favour of infants, who on account of their infancy, are not able to protect themselves, but also in the case of adults who are not in a situation to manage themselves and property. How is it, that this Court continually exercises its jurisdiction in cases of process issuing against persons who are lunatics,

lunatics, though not found to be so, — persons incapable of managing their own affairs, but not found to be lunatics? How often the Court interferes, and appoints a guardian *ad litem* to act for them, and provides for the expenses, so that justice may be done in those particular cases. I think, therefore, it is a mistake to say, that the jurisdiction of the Court regards merely the property in such cases; for there are, I think, many cases in which the Court, having to deal with property which the owner is not competent from incapacity of mind to use or protect for his own benefit, does, when the circumstances of the case require it, exercise a paternal and protective jurisdiction beyond the questions arising upon mere legal claims.

1846.  
NELSON  
v.  
DUNCOMBE

I will look at the case with care. One ought to make every allowance for the feelings of this gentleman: he cannot think that these proceedings were for his benefit, and, having got the verdict of the jury in his favour, may find it very unpleasant to make any allowance of this kind. That is not the question — the question for me to consider is, whether a trustee standing in this situation is to be called upon to account, without receiving any allowance for sums thus expended by him on behalf of his *cestui que trust*. If I make a decree on the subject, it is manifest that it cannot extend beyond the proper inquiries.

Judgment deferred.

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*The MASTER of the ROLLS.*

April 20.

Mr. Nelson, the Plaintiff in the first cause, is the son and residuary legatee of *Elizabeth Nelson*, deceased; Mr. Duncombe, the Defendant in the first cause, and the Plaintiff in the second cause, is her legal personal representative. Mr. Nelson's bill is filed for the common

1846.  
NELSON  
v.  
DUNCOMBE.

mon accounts, and for payment of the residue to the Plaintiff.

The will of Mrs. *Nelson* was dated the 19th day of *December* 1833, and she thereby appointed her son, Mr. *Nelson*, sole executor. She made a codicil dated the 21st of *February* 1834, and thereby appointed Mr. *Duncombe* an executor of her will, jointly with Mr. *Nelson*, and she died on the 2d day of the following month of *June*. The will and codicil were soon afterwards proved by Mr. *Duncombe* alone, power being reserved to the Plaintiff to prove them afterwards, which, however, he has never done.

Mr. *Duncombe* possessed and administered the estate, and is bound and willing to account for it. But he claims to be entitled to credit, in account, for expenses which, as he alleges, he has properly incurred in protecting and supporting the Plaintiff, whilst of unsound mind, and in suing out and prosecuting a commission *de lunatico inquirendo* concerning him.

The material facts to be considered with reference to this claim, (which give rise to the only question in the cause,) appear to be as follows : —

Mr. *Nelson*, in the lifetime of his mother, had been considered to be of unsound mind, and upon the usual medical certificates signed by Mr. *Glenn* and Mr. *Johnson*, was, in *March* 1833, and at his mother's request, placed in a lunatic asylum.

After being kept there for about three months, he was removed. By the fact of his removal, and by his mother having afterwards appointed him, at first, sole executor, and, subsequently, joint executor with Mr. *Duncombe*,

*Duncombe*, it must, I think, be presumed, that she considered him to have recovered, and to have become of sound mind.

1846.  
NELSON  
v.  
DUNCOMBE.

After the mother's death, and in 1835, the Defendant *Mr. Duncombe* offered to account and settle with him, and by that offer, must, I think, be presumed to have considered him to be then of sound mind. *Mr. Nelson* took no notice of the offer to account, and he seems to have refused to have any communication whatever with *Mr. Duncombe*, who, nevertheless, had in his hands or power very considerable sums of money which belonged to the estate of the testatrix, and of which he was trustee for *Mr. Nelson*.

In this state of things, and in August 1839, *Mr. Nelson* was taken before a magistrate, on a charge of having threatened to kill or do some bodily harm to the medical gentleman who had attended his mother in her last illness, and who bears the same name as one of the two medical persons, on whose certificate *Mr. Nelson* had been placed in a lunatic asylum, in his mother's lifetime.

On this charge, the magistrate required *Mr. Nelson* to find sureties to keep the peace, and on his failing to procure such sureties, he was committed to prison.

Under these circumstances, *Mr. Duncombe* was applied to, as the executor of *Mrs. Nelson's* will and as *Mr. Nelson's* trustee in possession of his property to a considerable amount. He was informed of *Mr. Nelson's* imprisonment on a charge of threatened violence; it was suggested to him, that a recurrence of *Mr. Nelson's* former malady had taken place, that he was not criminal, but that, for the sake of himself and others, he required protection and proper restraint.

Mr.

1846.  
  
 NELSON  
 v.  
 DUNCOMBE.

Mr. *Nelson* was without any relation, and, so far as appears, without any friend in the world. If the facts and the suggestions communicated to Mr. *Duncombe* were true and well-founded, it can hardly be doubted, that Mr. *Duncombe* had, at least, a moral duty imposed upon him to inquire into the matter, and, if necessary, to adopt such measures as were requisite for Mr. *Nelson's* protection and support. Sad, indeed, would be the condition of men, if, in circumstances so painful, some duty to interfere or assist did not rest upon all men. If Mr. *Nelson* had been a poor man without resources, it would have been the duty of those who were near him, to obtain from the law such protection and restraint as the law affords in such cases, and to obtain his release from the restraint to which he was subjected as an offender against the law; and it cannot, I think, be doubted, that Mr. *Duncombe*, having in his hands property belonging to Mr. *Nelson* out of which he might be protected and maintained, could not, consistently with his duty, remain a passive observer of Mr. *Nelson's* imprisonment for want of sureties.

Mr. *Duncombe* thought (in my opinion rightly), that it was his duty to interfere; whether he interfered in a proper manner, and did all and no more than ought to have been done, in circumstances so difficult and so delicate, may be questioned; but I must consider that it was right for him to interfere.

He procured medical advice, applied to the magistrate by whom Mr. *Nelson* had been committed, and upon the medical certificates required by law, and with the authority of the magistrate, Mr. *Duncombe* procured Mr. *Nelson* to be removed from the prison in which he was confined to the lunatic asylum in which he had formerly been placed by his mother.

To

1846.  
  
 NELSON  
 v.  
 DUNCOMBE.

To the restraint, the regulations, and the means intended for protection which the law provides in such cases, Mr. *Nelson* was subjected for upwards of five years. In *September* 1844, he escaped, as it is said, from the convalescent ground in which he was exercising. He soon afterwards consulted the solicitors by whom this suit is prosecuted on his behalf. They obtained medical opinions on the state of his mind, and they state, in their letter to Mr. *Duncombe* of the 12th *October* 1844, that the medical opinions, "though decisive of the existence of a mild form of insanity, shew, that it would be improper again to place him in a lunatic asylum;" and they afterwards expressed themselves as follows:—"We made you acquainted with these circumstances, because you had been, as we were informed, a friend of Mr. *Nelson's* late mother, that you are her executor, and hold in that character a considerable sum of money in trust for Mr. *Nelson*; and we concluded, (he not having, as far as we can ascertain, any relations,) that you were the most likely person to take an interest in him, and the most proper person to petition for a commission of lunacy, which seems to us the only course to be pursued." Some subsequent correspondence took place between Messrs. *Crosby* and *Compton* and Mr. *Faithful*, then Mr. *Duncombe's* solicitor. Messrs. *Crosby* and *Compton* suggested, under the advice of counsel, that Mr. *Duncombe* ought not to hesitate about presenting a petition for a commission of lunacy, and that if he declined to do so, they should call upon him to render his accounts and pay over the money. Mr. *Faithful* answered on the 26th of *October* 1844, that Mr. *Duncombe* was ready to account to the parties who could give him a proper discharge, but that he could not recommend Mr. *Duncombe* to apply for a commission of lunacy; and on the 11th day of the following month of *November*, Mr. *Nelson's* bill was filed.

The

1846.  
  
 NELSON  
 v.  
 DUNCOMBE.

The medical opinions, mentioned in the letter of Messrs. *Crosby* and *Compton* of the 12th of *October*, are important to be considered. The first is the certificate of Dr. *Cohen*, and it is dated the 27th of *September* 1844. It is as follows :— “ I hereby certify, that I this day visited Mr. *John Nelson*, and consider him, after a careful examination, to be of unsound mind. He is harmless at present, although, from his own account, I should conclude, that, at a previous period, he had been extremely violent. It is necessary, therefore, to guard against any paroxysm to which he may be liable, to subject him to an effective and kind control. As his illusions are, to a very great extent, mixed up with lunatic asylums, it would not, in my opinion, be giving him a fair chance of recovery, were he recommitted to one. I would, therefore, recommend that he should be placed under such subjection, as, while it will permit him his liberty, as far as is consistent with his state, and tend to free his mind from the illusions under which he labours, will, at the same time, be ready to controul any sudden excitement which may arise.”

The next is the opinion of Dr. *Clendinning*, which is dated the 30th of *September* 1844, and is expressed as follows :— “ I certify, that, by desire of Messrs. *Crosby* and *Compton*, I yesterday visited Mr. *John Nelson*, and that I found him in possession of good physical health and in perfect tranquil state of mind ; but that a protracted interview and a long conversation with him have convinced me, that he labours under illusions characteristic of a mild form of mental disease, involving no immediate danger to himself or others, but requiring an habitual, yet unobtrusive and gentle, domestic care, with professional superintendence, in order that he may have a fair chance and reasonable expectation of being, some future day, capable of permanently enjoying his liberty

liberty without risk or inconvenience to himself or others."

1846.

NELSON

v.

DUNCOMBE.

The result of their certificates seems to be, that *Mr. Nelson*, at the time when he was visited by these medical gentlemen, was deemed to be of unsound mind, but convalescent, and likely to recover under mild and gentle treatment,—treatment, however, requiring vigilant attention, and, if necessary, an effective control.

*Messrs. Crosby and Compton* are not to be blamed, for insisting that, under such circumstances, a commission of lunacy should be applied for, or for advising, as they did, that *Mr. Nelson* should be attended by a person experienced in cases of lunacy; and I think that *Mr. Duncombe* is not to be blamed, for being reluctant either to apply for such a commission, or to account to a person not competent to give him an effectual discharge.

A few days after the bill was filed, *Mr. Duncombe* was informed, that it had been reported to the Lord Chancellor, that *Mr. Nelson* was a violent lunatic and unsafe to be abroad; and, in consequence of an intimation which accompanied this information, some further communications on the subject of applying for a commission of lunacy took place between the solicitors. In the end, *Mr. Duncombe* consented to sue out the commission, and having put in his answer to *Mr. Nelson's* bill, and thereby admitted the funds and monies in his hands, an order for transfer and payment of monies into Court, dated the 31st day of *July* 1845, was made, on the motion of *Mr. Nelson*; and it being recited in the order, that it having been agreed between the solicitor of *Mr. Nelson* and the solicitor of *Mr. Duncombe*, that *Mr. Duncombe* should retain in his hands the sum of 500*l.*, to enable him to meet the outlay and charges



1846.  
NELSON  
v.  
DUNCOMBE.

of prosecuting the commission of lunacy, the sum ordered to be paid in by Mr. *Duncombe* was reduced accordingly. In the course of communications on the subject of the commission, Mr. *Faithful*, in his evidence, states that Messrs. *Crosby* and *Compton* urged the propriety, and indeed the necessity, of a commission being issued, as it was evident that Mr. *Nelson* was of unsound mind. They negatived a proposal that they should apply for a commission themselves; but it was distinctly understood, that, if the application were made by Mr. *Duncombe*, no opposition should be offered, and Mr. *Duncombe* should be allowed the costs attending upon the proceeding. This evidence seems to me to be in accordance with the admitted facts and the probabilities of the case; but I cannot say that facts so important are so distinctly put in issue, as to enable me to say that Mr. *Nelson* ought to be bound by the evidence in its present state. Under these alleged circumstances, however, Mr. *Duncombe* prosecuted the commission, and the inquest was held on the 22d of *April* 1845. The evidence which was given on the occasion by *William Theodore Elliot*, a surgeon and one of the proprietors of the asylum, has been proved in this cause, and is, in many respects, most unsatisfactory. The jury found, that Mr. *Nelson* was then of sound mind and capable of taking care of himself and his property. The verdict has not been impugned, and no new commission has been issued. It must, therefore, be admitted, that on the 22d of *April* 1845, Mr. *Nelson* was of sound mind, and there is nothing to shew that he has not ever since continued to be so. Soon after the verdict, Mr. *Duncombe* offered to settle his accounts with Mr. *Nelson*; but the allowance of the expenses he had incurred being refused, he filed his bill on the 3d of *June* 1845, and has thereby prayed a declaration of his title to the allowance, and that the allowances may be made on the taking of the accounts. Under the circumstances which

which had occurred, and having regard to the fact that the commission had been sued out and executed, after the answer of Mr. Duncombe to Mr. Nelson's bill was put in, I do not think that the filing of Mr. Duncombe's bill was improper or unnecessary for the due statement of his case.

1846.  
NELSON  
v.  
DUNCOMBE.

Mr. Nelson is, of course, entitled to the ordinary presumption of sanity, and relying upon that, he insists, that every thing done by Mr. Duncombe has been improperly done, contrary to his interest, and in violation of his personal rights; and that he is in no way indebted to Mr. Duncombe for the monies expended in prosecuting the commission, or in supporting Mr. Nelson at the asylum.

On the other hand, presumption of sanity may be rebutted by proper evidence. The legislature has defined the circumstances under which persons may be treated and confined as insane, though not so found by inquisition; and, upon the production of evidence which the legislature has appointed, authority is given to subject persons to whom insanity is imputed, to the species of confinement and control to which Mr. Nelson was subjected. Mr. Duncombe insists, that in the situation in which he was, and with the evidence he had before him, he acted in discharge of a duty which he owed not only to Mr. Nelson, but to society, or to all who were exposed to injury by the state of Mr. Nelson's mind; and out of the monies in his hands, he claims to be entitled to be reimbursed his expenses, incurred in the discharge of his duty, and especially in applying for and prosecuting the commission, which he did, in consequence, as he says, of the request of Mr. Nelson's solicitors, and upon the understanding that his expenses were to be paid.

1846.  
  
 NELSON  
 v.  
 DUNCOMBE.

Whether Mr. *Nelson*, by his solicitors, suggested to Mr. *Duncombe*, that, if he applied for the commission, his expenses should be allowed, is a distinct question, not perhaps admitting of decision at this time, but free from the particular difficulties which attend the main question in this case. If it should appear, that Mr. *Duncombe* was induced to incur these expenses by Mr. *Nelson's* agents, for Mr. *Nelson's* benefit, on sufficient grounds of reliance that he should be allowed them in account, they would be allowed to him, independently of the other question in this cause; and the circumstances are such, that, if it be desired, I think there must be a special inquiry on the subject.

The principal question to be now determined, arises on Mr. *Duncombe's* claim to be allowed, in account, the expenses he incurred in maintaining Mr. *Nelson* in a lunatic asylum, from *August* 1839 to *September* 1844.

The question is not precisely the same as that which has arisen in the cases of lunatics so found by inquisition. There being no lunacy or unsoundness found, the question of implied debt does not arise in the form in which it has arisen in those cases; there wants something of the solid and firm foundation on which the courts, both of law and equity, have, in those cases, determined, that a debt was incurred by implied contract.

The question must be considered with reference to the special circumstances in which it arises.

It is not denied, that Mr. *Nelson* was placed, detained, and visited in the asylum, in the manner authorised by law. No action has been brought against any parties for misconduct, and there is no evidence of any malice or rashness on the part of Mr. *Duncombe*. Notwithstanding all that, I do not hesitate to say, that, if  
 Mr.

**Mr. Nelson** was of sound mind in *August* 1839, or if he was of unsound mind, and the asylum in which he was placed was not proper for his protection or the application of proper remedies for his recovery, or if he was detained longer than he ought to have been, or improperly treated, the forms of law were neglected or abused: he was unjustly or wrongfully imprisoned, and suffered an injury, as great as any which can be inflicted on man. But this may have been without just imputation on **Mr. Duncombe**: it may have arisen without his knowledge or acquiescence, from want of knowledge or skill in the medical advisers, want of judgment or humanity in the keepers, want of due vigilance or attention in those who were appointed by law to visit the asylum.

1846.  
NELSON  
v.  
DUNCOMBE.

But if the outrage committed by **Mr. Nelson** in *August* 1839 was, in truth, the result of insanity; if, for want of capacity, he was liable to injure himself and others; if he was placed under proper protection and properly treated, the greatest service which could be rendered to him was to provide for his protection, and subject him to a curative process. To this it may be owing that he became convalescent at the time of his escape, and though not then well, recovered so as to be found of sound mind in *April* 1845. On a consideration of the evidence, it does appear to me, that under the circumstances which came to the knowledge of **Mr. Duncombe** in *August* 1839, it was his duty to interfere for the protection of **Mr. Nelson**, a duty of imperfect obligation perhaps, but still a duty not to be neglected. I think that it was his duty to interfere, either by his own act, or by procuring a bill to be filed in this Court, for the purpose of obtaining directions for the application of **Mr. Nelson's** income, for his protection and support. By applying to the Court, he might have been exempted from all but very slight risk;

1846.  
NELSON  
v.  
DUNCOMBE.

risk; by taking upon himself to interfere, without the sanction of the Court, he also took upon himself the burden of proving to the Court, if necessary, that the expenses he incurred by interference were proper to be allowed in account. I conceive, that, if a proper application had been made, this Court, acting in conformity to that which Lord *Eldon* calls, "its habit of taking notice of persons in such a state of imbecility for their protection (a)," would have inquired, in what way the income or property of Mr. *Nelson* (appearing to be unable to take care of and protect himself) could be best applied for his safety and protection. I think that this Court might have directed a commission of lunacy to be applied for, or might have directed Mr. *Nelson* to have been taken care of in some proper asylum, of the same nature as that in which he was placed. The particular course to be pursued would have depended upon the particular circumstances, as shewn by evidence, one of which would have been, that Mr. *Nelson* had once recovered after being placed in the asylum.

But, whatever might have been the directions given to Mr. *Duncombe* or to any guardian to be appointed by the Court, I think, that, under any circumstances, if Mr. *Nelson* (being afterwards of sound mind) availed himself of the jurisdiction of this Court to compel Mr. *Duncombe* to account for money in his hands, this Court would have compelled Mr. *Nelson* to do equity and justice on his part, and to allow all expenses, properly incurred for his own protection and maintenance, at a time when he was unable to take care of himself. And if Mr. *Duncombe* has done no more than that which he would have been directed to do, upon the facts appearing in a suit properly instituted, can there be any good reason why, in such a case as this, he should

(a) 19 *Ves.* p. 283.

should not have the like allowance? The circumstances are not precisely the same, because Mr. *Duncombe*, by acting for himself without first obtaining the sanction of the Court, has necessarily assumed the burden of proving the propriety of all that he did. But, supposing him to do this, can any sufficient reason be given why he should not be allowed, in account, the money which he has properly expended for the protection and benefit of Mr. *Nelson*, at the time when Mr. *Nelson* was incapable of acting for himself.

1846.  
NELSON  
v.  
DUNCOMBE.

The objection is made to the jurisdiction. It is said, that, as no lunacy has been found, there can be no implied contract, and in the absence of contract, the Court has no jurisdiction to adjudicate upon the claim.

It is, I think, true, that in all the cases of implied contract which have been decided, there has been a lunacy actually found; but it has not been determined, that this Court will not take notice of what is done, in respect of the property of persons lunatic though not so found, or that a contract may not be implied for the supply of necessities to such persons.

A bill may be filed in the name of a person alleged to be of unsound mind, though not so found by inquisition, by any one professing to be his next friend; such a person may be sued as a Defendant, and the Court appoints a guardian to answer for him (a); and in such cases, as Lord *Eldon* observes, this Court "imposes all the restraints of infancy, and the party is bound by all the acts of the guardian" so appointed. It is thus, that in cases where property in which such persons are interested is brought under the consideration

(a) See *Needham v. Smith*, 6 Beavan, 130. note (a) and 32nd Order of May 1845, Ord. Can. 296.

1846.  
 NELSON  
 v.  
 DUNCOMBE.

sideration of the Court, the Court being satisfied by proper evidence that they are incapable of protecting their own interests, treats them as infants or as insane, though not so found by inquisition; and being satisfied that their next friend or guardian pays proper attention to their interests, and making all such inquiries as may be necessary, to ascertain not only what their rights are, but what is beneficial to them, or, if necessary, directing that a commission may be applied for, ultimately deals with their rights and property as justice may require. When the Court goes so far, in adjudications upon property belonging to persons deemed to be insane, though not so found by inquisition, I own that there does not seem any sufficient reason why a contract might not, if necessary, be implied in favour of a person who has supplied such a person with necessaries, or provided such persons with such protection and support as the legislature has sanctioned, in the absence of any finding by inquisition. But it scarcely appears to me to be necessary to resort to the doctrine of implied contract. Lord *Eldon* did not do so in the case of *Sheppard v. Sanderson* (a), in which he ordered payment of the expenses of suing out a commission of lunacy concerning a person to whom insanity was imputed, and who had been found not lunatic, but of unsound mind. This was done under the general jurisdiction of the Court in a cause, pending a traverse which prevented any exercise of jurisdiction over the property of the party "in the matter of the lunacy." I think that the principles and practice referred to by Lord *Eldon* in that case authorises me in saying, that if a trustee is sued for an account in this Court, and it shall appear that he has properly expended sums of money for the protection and safety or for the maintenance and support of his *cestui que trust*, at a time when the *cestui que trust* was

(a) 19 Ves. 280.

was himself incapable of taking care of himself, this Court will allow him credit for such sums of money.

1846.

NELSON  
v.  
DUNCOMBE.

There are two things to be shewn: first, that the *cestui que trust* was incapable of taking care of himself; and, secondly, that the sums of money for which credit is asked were properly expended for his protection and benefit.

I shall, therefore, refer it to the Master, to inquire whether, in the month of *August* 1839, the Plaintiff Mr. *Nelson* was of unsound mind, or in such a state of mind as to be incapable of taking due care of himself. And, if the Master shall find that he was either of unsound mind, or in such a state of mind as to be incapable of taking care of himself, let the Master further inquire, under what circumstances Mr. *Duncombe* interfered to take care of Mr. *Nelson*, and to place him in the lunatic asylum, and under what circumstances and for how long Mr. *Nelson* was detained in such asylum, and what sums of money were properly expended by Mr. *Duncombe*, for the protection, care, and support of Mr. *Nelson*, whilst he remained in such asylum. And let the Master further inquire, whether Mr. *Nelson* was of unsound mind, or in such a state of mind as to be incapable of duly managing his affairs in the month of *September* 1844, and from that time till the 9th day of *January* 1845; and under what circumstances the commission of lunacy, in the pleadings mentioned, was sued out and prosecuted; and whether any and what agreement or understanding, respecting the costs of suing out and prosecuting such commission, was entered into or subsisted between Mr. *Nelson* and Mr. *Duncombe* or their respective solicitors. And let the Master be at liberty to state any special circumstances, in relation to the matters so referred to him or any of them.



1845.

Nov. 18.  
Dec. 15.*In re PRICE.*

A solicitor, acting for a third mortgagee, negotiated for a transfer of the first mortgage, and had proceeded so far as to send the drafts. He took a journey into the country to complete the matter, which proved fruitless, and having previously received an intimation that the second mortgagee had already obtained a transfer of the first mortgage, the costs of the journey were, on taxation, disallowed, on the ground that, after that intimation, he ought to have obtained his client's sanction before incurring the expense.

**T**HIS was a petition presented by Mr. *Price*, a solicitor, for the review of the Taxing Master's certificate, by which he had disallowed a sum of 32*l.* 8*s.*, the expenses of a journey taken by the Petitioner into *Cornwall*, in relation to the business of his client.

It appeared that Mr. *Nattle* had mortgaged some property, first to Mr. *Jope* for a sum of 2450*l.*, and, secondly, to Mr. *Bate* for 750*l.*, and that, thirdly, in May 1832, Messrs. *Twinings* had lent him 2500*l.* on an agreement to mortgage the same property. *Nattle* concealed from Messrs. *Twinings* all knowledge of the second mortgage which he had made to Mr. *Bate*.

*Nattle* fell into difficulties, and, on the 25th of November 1843, *Glubb*, the solicitor of *Jope* the first mortgagee, wrote from *Cornwall* to *Price* (who acted for *Twinings*, on the retainer and on the account of *Scales* a surety for *Nattle*), and proposed that they, *Twinings*, should take a transfer of *Jope's* mortgage. This was consented to; an abstract was furnished on the 6th of December; and on the 20th *Price* forwarded to *Glubb* in *Cornwall* the draft transfer. Messrs. *Twinings* afterwards hesitated, and *Price* thereupon used great activity in endeavouring to raise the money from other sources. Ultimately, however, *Twinings* consented to the arrangement; and on the 30th of December, *Price* went into *Cornwall* to complete the transfer. He had an interview with *Glubb* on the 2d of January, and was told by him that *Jope's* mortgage

gage had the day before been satisfied by *Bate*, and thus the journey proved fruitless.

1845.

*In re PRICE.*

In the taxation of *Price's* bill, the Master disallowed the expense of the journey, on the evidence of *Gadsden*, the solicitor of *Nattle*; the mortgagor, who stated, that, on the 29th of December 1845, he had informed *Price*, in London, that *Jope's* mortgage had already been got in by *Bate*, and that it would be incurring an useless expense to take the journey.

*Price*, on the other side, stated, that he did not believe the assertion of *Gadsden*, and that his information was incorrect, for, in fact, the transfer had not taken place on the 29th.

*Price* now presented a petition for a review of the taxation.

Mr. *Kindersley*, in support of the petition, contended that the Petitioner was not bound to rely implicitly on the information of *Gadsden*, which was, in fact, incorrect, and that, it being a matter of great importance to get in the first mortgage, he had properly and zealously performed his duty, by going himself into *Cornwall*, attending to it personally. That the propriety of the journey could not be determined by the result, but must be tested by the rules of sound discretion, and by the answer to the question, what would a prudent man have done under such circumstances.

Mr. *Turner* and Mr. *John Baily*, *contra*, argued, that after the information he had received, *Price* was not justified in incurring the expenses of a journey into *Cornwall*, and, at all events, he ought previously to have obtained the sanction of his client to that step.

They

1845.  
  
*In re PRICE.*

They cited *Alsop v. Lord Oxford*. (a)

Mr. Kindersley, in reply.

*The MASTER of the ROLLS.*

I cannot help thinking that the Petitioner has been very ungraciously used. He appears to me to have used great activity and pains in making arrangements to get a transfer of *Jope's* security, in order that Messrs. *Twinings* might have adequate security on the estate; but the journey having turned out to be quite useless, the question of strict right is to be determined, which is, who is to bear the expense. On the 20th of *December*, a draft assignment was sent to the solicitor of *Jope* in the country, and for ten days after, nothing had been done to complete the business. I apprehend it was *prima facie* of great importance to obtain a transfer of *Jope's* security, if possible, and if *Price* had reason to believe that he could more satisfactorily effect it by going into *Cornwall* himself, I am not prepared to say he was not justified in doing so.

On the 29th, *Gadsden*, who was acting for *Nattle* the debtor, but may have been a stranger to *Price*, informed him that it was no good his going to *Liskeard*, because *Bate* had already taken a transfer of *Jope's* security. That information given on the 29th was not perfectly correct; but it was an intimation of that which was afterwards effected. The question is, whether on this intimation *Price* was justified in going to *Liskeard*, without first communicating with *Scales* his client.

The Master has come to the conclusion that he ought not to have gone without first communicating with his client,

(a) 1 *Myl. & K.* 564.

client, and has disallowed the charge, not because *Gadsden* had given the information, but because he afterwards took on himself to act on his own discretion, and the expense turned out a loss. I think that the journey ought not to be allowed. I regret it, because *Price* acted with fairness and with great zeal in the matter; but when it comes to a question of strict right, it appears that after *Gadsden* the solicitor of *Nattle* had given this information, and the matter appeared doubtful, *Price* was not strictly justified in incurring the expense of a journey, without first consulting his client, and obtaining his sanction.

1845.  
In re PRICE.

I must dismiss this petition, and with costs, it being against the Master's report.

JONES v. SKIPWORTH.

Nov. 9.

THIS case came on upon demurrer to a bill of revivor. The circumstances of this case were as follows:—

The original bill was filed in 1843, by *Frederick Westlake*, who alleged, that he, as tenant in common with the Defendants, was entitled to a moiety of some copyhold lands, to which he had established his title at law, but that, in consequence of an enclosure going on, he was unable, at law, to obtain possession. He prayed that the Defendants might be decreed to convey to him a moiety

Husband and wife sued, amongst other things, for an account of the rents of her copyhold estate. The wife died. Held, on demurrer, that it was not necessary to make her personal representatives a party to a bill to revive the suit. Upon overruling a de-

murte, liberty was reserved to the Defendant to raise the same objection at the hearing.

1845.  
  
 JONES  
 v.  
 SKIPWORTH.

a moiety of the allotment, and for an account and payment of a moiety of the rents and profits.

*Frederick Westlake* died on the 5th November 1844, and his interest in the estate devolved upon *Jemima*, the wife of *John Jones*, and five other persons, who filed their bill of revivor and supplement, and revived the suit.

After this, and on the 6th of June 1845, *Jemima Jones* died, leaving *John Jones* her husband and *Frederick Jones* her heir, surviving her.

This bill was filed by *John Jones*, *Frederick Jones*, and other parties to revive the suit, which had thus abated by the death of *Jemima Jones*.

The Defendants demurred, on the ground that the legal personal representatives of *Jemima Jones* had not been made parties.

Mr. *J. H. Law*, in support of the demurrer, argued, that Mrs. *Jones's* share of the rents which accrued between the death of *Frederick Westlake* and her own, passed to her legal personal representatives, and not to her husband.

He cited *Clarence v. Marshall* (a), *Denys v. Shuckburgh* (b), *Betts v. Kimpton* (c), *Metcalf v. Metcalf*. (d)

Mr. *W. M. James*, *contra*. There was issue of the marriage between Mr. and Mrs. *Jones*; and, by the law of

(a) 2 Cr. & M. 495.

(b) 4 Y. & Col. (Exch.) 42.

(c) 2 Barn. & Adol. 273.

(d) 1 Keen, 74.

of *England*, the rents of the wife's estate accruing during the coverture, belong to the husband in his own right; and it is, therefore, unnecessary to have her legal personal representatives before the Court. He cited *Roper on Husband and Wife*. (a)

1845.  
JONES  
v.  
SKIPWORTH.

Mr. J. H. Law, in reply.

*The MASTER of the ROLLS.*

I must overrule the demurrer; but, as this case does not appear to be very clearly stated, I will reserve to the Defendants the right of raising the same objection at the hearing of the cause (b), if they should think fit.

(a) p. 3.

(b) *Kirwan v. Daniel*, V. C. Wigram, 18th March, 1847.

STOCKEN v. DAWSON.

Nov. 17,  
18, 19.

**JOHN** and William Stocken carried on the trade of brewers in partnership. A. authorised the sale of his share in a brewery to B., his surviving partner, whom he appointed one of his executors, B. conceiving he

John Stocken, by his will, directed that his share in the brewery, &c. &c. should be valued and ascertained, and had duly become the purchaser, carried on the business until his death, and it was subsequently carried on by C. his executor. Afterwards, upon a bill filed, the sale was set aside, and the estate of A. became entitled to share in the profits made subsequent to A.'s death. C. afterwards became bankrupt, having the whole trade property in his possession. Held, *first*, that the trade creditors during the time the business was carried on by C. had no lien for their debts on A.'s share; and, *secondly*, that the property was not within the order and disposition of the bankrupt.

1845.  
  
 STOCKEN  
 v.  
 DAWSON.

and be offered for sale to his surviving partner, *William Stocken*, on fair and reasonable terms; but in case *Stocken* declined to purchase his share in the brewery, it should be carried on for the better maintenance of his wife and children; and he appointed *William Stocken* and two other persons executors.

The testator died in *May* 1820, and in *June* 1820 a valuation was made of the brewery, &c. *William Stocken* kept possession of the business and carried it on, as purchaser and sole owner, under the option contained in the will, until the time of his death.

*William Stocken* died in 1824, having bequeathed his interest in the brewery to his son *Oliver Stocken*; he appointed *Oliver*, and two other persons, executors, and *Oliver* thenceforward carried on the business, under the notion that it was his own.

The bill in *Stocken v. Dawson* was filed by the executor of *John Stocken*, in 1827, insisting on the invalidity of the alleged sale to *William*, of *John's* moiety of the business, and the sale was, by the decree in 1830, set aside: the brewery was directed to be sold, and necessary accounts were directed to be taken. *Stocken's* moiety of the brewery was purchased by *Charles Stocken* in *July* 1838; but, in *November* 1838, before the purchase had been completed, *Oliver Stocken* became bankrupt, and his interest was now represented in the suit by his assignees.

There was a subsequent resale, and the produce of the sale was brought into Court.

The debts and liabilities of the concern, down to the death of *William Stocken*, had now been paid; but on the death of *Charles Stocken*, the assignees of *Oliver Stocken* claimed the moiety of the brewery which had been purchased by *Charles Stocken*.

*debts* and liabilities of the concern from the death of *William* to the bankruptcy of *Oliver*, 4556*l.* remained unpaid, although it appeared that a profit of nearly 8000*l.* had been made during that period.

1845.  
STOCKEN  
v.  
DAWSON.

The cause afterwards came on upon exceptions to the Master's report, and the proceedings, on that occasion, will be found reported in a former volume (a); some of the exceptions having been allowed, and others referred back, the case was remitted to the Master's office.

In December 1844 the Master made his second report; the Defendants took exceptions, and the cause now came on upon the exceptions, and for further directions.

The two principal questions were these:—The assignees of *Oliver* contended, that the trade debts which accrued during the period that *Oliver* carried on the business, and which still remained unpaid to the extent of 4500*l.*, ought to be paid out of the fund in Court, representing the trade assets, in priority of the Plaintiff; and, secondly, that the whole stock, &c. being in the order and disposition of *Oliver* at his bankruptcy, passed to his assignees.

Mr. Kindersley and Mr. A. Gordon, for the Plaintiff, who was entitled to a moiety of the testator's residuary estate, claimed, amongst other things, a moiety of the produce of the brewery, and a lien on the other moiety for the profits belonging to *John's* estate, and arising subsequent to his death.

Mr.

(a) 6 *Beavan*, 371.

VOL. IX.

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1845.  
  
 STOCKEN  
 v.  
 DAWSON.

Mr. *Goodeve*, for two children of *William Stock*

Mr. *Whitbread*, for *Oliver Stocken*.

Mr. *Turner* and Mr. *Roupell*, for the assignee of *Oliver Stocken*. The question is, whether the Plaintiff is to take half the fund without paying his share of the debts due from the concern. The Plaintiff, by his counsel, treats this as a trade carried on by *William*, and not by *Oliver* for his benefit, under the trusts of the will. If then this be a *quasi* partnership, the first thing to be ascertained is, what are the debts due from the partnership, and are they paid, for the Plaintiff can take the fund without paying the debts. Again, if there was a partnership, then it was a trade carried on by a trustee for the benefit of the Plaintiff and the estate of *Oliver*; such trustee is then entitled to be indemnified for the debts contracted by him for the trade, and the payment must be to the creditors. The testator, *Stocken*, having directed the trade to be carried on for the benefit of the Plaintiff and the estate, the assets are liable to the debts incurred in the execution of that trust. *Cutbush v. Cutbush*. (a)

[*The MASTER of the ROLLS.*

Can you produce any authority for the proposition that a party, carrying on a trade without the consent of the parties entitled to the capital, can be liable for the debts he may incur?]

That is not the case here, for the parties themselves have elected to put an end to the trade; on the contrary, they even now elect to treat this as a trade continued for their benefit. If so, it must be such for all purposes.

(a) 1 *Beavan*, 184., and see *Ex parte Richardson*, 10 *Ves.* 110.; 202.



The following cases were cited :— *Ex parte Ruffin* (a), *Ex parte Williams* (b), *Grace v. Smith* (c), *Ex parte Garland* (d), *The Decree in Davies v. Boyle*. (e)

1845.  
STOCKEN  
v.  
DAWSON.

Mr. Kindersley, in reply. The principle cannot be doubted, that a partner has a specific lien on the partnership property for what may be due to him. (g) John's lien existed at his death, and nothing was afterwards done to defeat it; the subsequent creditors of the concern could therefore acquire no rights against the partnership property, except subject to that lien.

No partnership existed after the death of John, and the trade was carried on, not for the Plaintiff, or in pursuance of the trusts, but in direct opposition thereto, and adversely to his rights; and the capital having been employed in trade, the Plaintiff is entitled to a moiety of the profits after deducting the debts, which has been done in this instance. Oliver received sufficient to pay these debts, but neglected to do so, and they have been deducted in the computation of the profits. The creditors, during Oliver's management, who relied on his security, acquired no lien on the property belonging to the estate of John.

The property cannot be said to be in the "possession, order, and disposition" of the bankrupt, at the time of his bankruptcy, "by the consent and permission of the true owner." The possession was wholly adverse, and the property was protected by the existing trust. (h)

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|----------------------------|---------------------------------|
| (a) 6 Ves. 119.            | (h) See 6 Geo. 4. c. 16. s. 72. |
| (b) 11 Ves. 3.             | Joy v. Campbell, 1 Sch. & Lef.  |
| (c) 2 Wm. Black. 998.      | 328.; Ex parte Martin, 2 Rose,  |
| (d) 10 Ves. 110.           | 331.; In re Thomas, 1 Phillips, |
| (e) Seton on Decrees, 240. | 159.                            |
| (g) See Skipp v. Harwood,  |                                 |
| 2 Swann. 586.              |                                 |

1845.



STOCKEN

v.

DAWSON.

Nov. 19.

*The MASTER of the ROLLS.*

This difficult and complicated case has now been reduced to a few points.

It is not necessary to state minutely the facts of the case, but so much only as relates to the questions remaining for decision, which are these:—*John* and *William Stocken* were partners as brewers. In *May* 1820, *John* died, having, by his will, authorised a sale of his share in the business to be made to *William*, the surviving partner; but if *William* did not purchase it, then he directed that the trade should be carried on for the benefit of his own legatees. After *John's* death, *William* carried on the trade: he intended to purchase *John's* share, and some valuations for that purpose were made: he supposed that he had, in reality, become the purchaser, and he continued in that supposition up to the time of his death. He died in 1824, having, by his will, given what was supposed to be his interest in the property to *Oliver*. *Oliver* carried on the trade, thinking it his own till he became bankrupt. In *January* 1827, the Plaintiff being interested in *John's* share of this concern, filed his bill against *Oliver*. He desired to have the property sold; he claimed a right to set aside the purchase which both *William* and *Oliver* thought had been made; and, as one moiety of the property engaged in carrying on the trade was the property of his testator *John*, he desired to have the profits ascertained, in order that a moiety might be paid to him. In the course of the proceedings, the purchase was set aside. The accounts have now been taken, and it has been ascertained what, on the supposition of the Plaintiff being entitled to a moiety of the property, became due from the estates of *William* and *Oliver* to the estate of *John*, and also what was due from the estate

of *Oliver* to the estate of *William*. The figures are all ascertained.

1845.  
STOCKEN  
v.  
DAWSON.

The trade debts incurred in the lifetime of *John*, and those incurred in the lifetime of *William*, have been paid; but the debts which were due at the bankruptcy of *Oliver*, which had been incurred by him in carrying on the trade, amounting to 4500*l.*, have not yet been paid. It appears, however, that *Oliver* received far more than enough to pay them, for he received, in carrying on the trade, 136,000*l.* and upwards, and had paid 127,000*l.* and upwards, so that he had received 8000*l.* and upwards more than he had paid. At the time of his bankruptcy, there were debts due to the concern which have since been received by the assignees, to the amount of 3700*l.* and upwards; so that it is perfectly plain that the business was carried on at a very considerable profit, and the Master has, with perfect correctness, found it to amount to 7900*l.*, one moiety of which belonged to the estate of *John*. The profit made in that trade has not been applied as it ought to have been, nor have the receipts been applied as they ought; for *Oliver*, instead of applying that large balance in satisfaction of the debts of the concern, has disposed of it in some other manner. But because he did not apply that which he had acquired or become entitled to in the way in which he ought to have done, is it not profit? I conceive there is no doubt that it was profit.

Then comes the question raised on further directions. It is said, that these debts (though they have been brought into account in the computation of profits) were, nevertheless, debts contracted in carrying on the trade in which certain property was employed, and that the creditors have a right to resort to that property for the payment of their debts. Now it need not be repeated,

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that

1845.  
 STOCKEN  
 v.  
 DAWSON.

that the creditors, who are here represented by the assignees, stand in the place of *Oliver* in this matter. It is true, that there are cases in which a right given to creditors upon a certain amount of property by which the concern is carried on; and while the property employed in the concern remained, the creditors, by some proper proceeding, might have attached their right up to the property; but never having resorted to any such proceeding, and the party having become a bankrupt, we must look very differently to the circumstances. If a trade is carried on with the property of another person, and a trust is attached to the property, as in the instance where a trader gives his stock in trade to his executor or trustee, in trust to carry on the trade for his family, it has been certainly held, that the creditors are creditors on the estate thus held in trust, and they may, to some extent, have right to resort to that particular property for payment of their debts; there are cases to that effect. But the rule is, I think, established in these cases, that the equity of the creditors against the property must depend on the equities between the partners. Then comes the question, whether there was a partnership. *William* was in the situation of a trustee of the trade, even after the sale took place; but was he ever a partner with the Plaintiff in carrying on that business? Did he ever give to the creditors a personal right against the Plaintiff? Could *Oliver* do it after the death of *William*? There never was any thing of the kind. *William*, in deed, was fixed with a sort of trust; but then all the debts contracted by him have been paid. *Oliver* was never in the situation of trustee; he never was involved in those circumstances: he claimed by the gift of *William* an absolute right in the property, his assignees, after his bankruptcy, held it in that right, not on the footing of a partnership, but as their own, and in this suit they endeavoured to establish that it was their

their own — and that from the beginning. But then it is said, if the Defendants cannot make out that there was any thing like a partnership by contract from the beginning, then there was something like a partnership from the nature of the claim made, as it appears from the allegations and the prayer of the bill that an account of the profits was asked. I am of opinion that that argument cannot be maintained, because it would put an end to the jurisdiction of the Court altogether against persons who engage in speculations of this kind. I make no imputation against *Oliver*, for I believe he thought he was employing his own property, and not the property of another person. It was a very unfortunate mistake, and nothing but a mistake; nevertheless, we know how frequently it happens, that persons, whose duty it is to withdraw the property of others, endeavour to keep it engaged in trade for their own profit; and it would reduce the jurisdiction of this Court to a very low ebb, if we were told that no person could ever demand an account of the profits arising from an improper use of his money, without making himself and his property liable to the debts incurred by those who were making an improper use of his capital. I think, however, that that argument cannot be maintained, and that there is nothing in this case which shews that the creditors acquired any lien, or any demand against the specific property engaged in this concern.

1645.  
STOCKEN  
v.  
DAWSON.

Then, how does the case stand as to the particular species of property engaged in the trade? There are two sorts of property; there was the brewery, and the copyhold estate attached to it, which was the joint and several property of *John* and *William*, which remained such from the death of *John* until the death of *William*; and thenceforward down to the bankruptcy of *Oliver*, as to

1845.  
 STOCKEN  
 v.  
 DAWSON.

one moiety of it, it was part of the estate of *John*, and as to the other moiety of it, it was part of the estate of *William*.

*Oliver*, at the time of the bankruptcy, is found in possession of this property, which belonged to the estate of *William* and the estate of *John*: *William* and *John* having been partners, the business having been carried on without extinguishing any claim which the estate of *John* had against *William*, or against his estate after his death, why is not the estate of *John* to have his moiety, and the same right against the estate of *William* which subsisted from the beginning? There seems to be no difficulty in that point, when it is once understood how this property is arranged between the parties. It seems to me clear that the estate of *John* is entitled to one moiety, and the estate of *William* to the other moiety of that property, subject to such right as the estate of *John* had upon it for the purpose of securing that, which in its origin, was no doubt a partnership debt.

Then, there was the other portion of the property, namely, the stock, which has been sold. If this were personal property in the order and disposition of *Oliver* the bankrupt, with the consent of the true owner, of course the creditors would, under the Bankrupt Law, be entitled to the benefit of it. But how are the facts as relating to this part of the case? Was the property in the order and disposition of *Oliver* with the consent of the true owner?

The bill having been filed in the year 1827, and demand being thereby made, that the property should not continue in the possession of *Oliver*, but that the whole should be sold, he resisted. It was said that the Plaintiff did not pray for an injunction; but

he asked it by his bill, and you must have regard to the time when the bill was filed, which was a perfect notice to *Oliver* that the trade was not to be carried on.

1845.

STOCKEN  
v.  
DAWSON.

That notice having been given to *Oliver*, that the Plaintiff intended to enforce his right to have a sale, in order that there might be a division between them, *Oliver* nevertheless continued to carry on the trade, contending that he was entitled to do it, and that the whole was his own. How then can it be said that this property was in the order and disposition of *Oliver*, with the consent of the true owner, at a time when the Plaintiff was contending, in a Court of Equity, that it ought to be sold and half given to him, and *Oliver* was contending that it was his own property? I think there is no foundation for the allegation, that the property was in *Oliver's* possession with the consent of the true owner; but, on the contrary, I think it was in his possession against the consent of the true owner.

The estate of *John* is entitled to a moiety of the produce of the sale, and an application ought to be made to the Court of Bankruptcy for an order that it may be paid to the Plaintiff.

As to the lien upon that fund, I think the right to it is apparent. When was that lien which the representative of the deceased partner has against the partnership property for what might be found due, put an end to? When did it terminate? Who alleges that it ever did terminate? It has been argued, that the Plaintiff has not asked for it by his bill as distinctly as he ought to have done. I think there is quite enough asked; but if there are not sufficient allegations, they are supplied by the very nature of the thing, for that is the law as between a surviving partner and the representative of a deceased partner.

I have



1845.  
 STOCKEN  
 v.  
 DAWSON.

I have considered the last point, which relates to the costs. The costs which are occasioned by this suit, so far as it seeks to set aside the purchase against *William*, ought properly to be charged against his estate. The costs of taking the account during the time of *William* must, I think, be necessarily charged against his estate. The costs which are incurred in taking the account after that time against *Oliver* seem to be subject to this consideration: I should not say that *Oliver* or his estate could be charged with those costs only on account of his possession of the property; because, as far as anything appears, no man ever took possession of property more innocently; but having taken possession of property quite innocently, and a claim being made by the Plaintiff, he insisted that the property was his, and has endeavoured to maintain it. He failed in that endeavour, and when the account comes to be taken, he is found a defaulter to a very considerable amount. If he had done as he ought with respect to the trade assets he received, there would have been no trade debt left unpaid; there would not have been any of the serious questions which have been just discussed; but all the expense and delay have arisen entirely from the mode in which he disposed of the funds which he received from that trade. When costs are demanded against a party in that situation, I confess I do not know how I can lawfully refuse them. I think if he had been proved a defaulter, and had not been a bankrupt, it would have been in vain to say, that he would not have been charged with the costs, and I do not know how to make the difference in this case. I say it with regret, because I see that he was brought into this situation and carried on the trade innocently, believing that he could rely upon the title given to him by his father, and his father himself thinking that he had been successful in completing the sale. I very much regret

that it should be so; but, as between two parties litigating adversely, I cannot give way to any feeling of that kind.

1845.  
STOCKEN  
v.  
DAWSON.

*Mr. Turner.* The costs against the estate of *Oliver* will be matter of proof and not of lien.

*The MASTER of the ROLLS.* Yes.

NOTE. — An appeal, in this case is now standing for judgment before the Lord Chancellor.

Earl MORNINGTON v. SMITH.

1846.  
Feb. 27.  
March 27.

**M**R. CHANDLESS, on the part of one of the Defendants, moved to dismiss the bill for want of prosecution. It was not disputed that the time for moving had expired as to this Defendant.

On a motion by one of several Defendants to dismiss for want of prosecution, it is not sufficient for the Plaintiff to shew that the answers of other Defendants have not been filed; he must also shew that due diligence has been used in getting them in. Plaintiff having failed in so doing, was ordered to pay the costs of the motion, and file a replication within a fortnight, and, in default, the bill was ordered to be dismissed with costs.

*Mr. Bloxam, contra,* stated that the answer of *Cutts*, another Defendant, had not been got in, and that the Plaintiff was not in a situation to proceed in the cause.

*The MASTER of the ROLLS.*

The time having expired as to the Defendant who now moves, he is entitled to make this motion (a), but he is not entitled to the order, if it can be shewn that the Plaintiff had used due diligence in getting in the answer of the other Defendants. The motion may either stand over, in order that the Plaintiff may have

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(a) *Dalton v. Hayler*, 7 Beavan, 586.

bill was ordered to be dismissed with costs.

1846.  
  
 Earl  
 MORNINGTON  
 v  
 SMITH.

an opportunity of giving an explanation, or the Plaintiff must file or undertake to file, a replication; in fault, the bill will be dismissed.

March 27. Mr. Chandless renewed the application.

Mr. Bloxam produced an affidavit, but which the Court thought did not satisfactorily explain the deed. He then asked for time to file a replication.

*The MASTER of the ROLLS.*

Let the bill be dismissed with costs, unless the Plaintiff files a replication within a fortnight. The Plaintiff must, at all events, pay the costs of this motion.

1845.  
 July 19.  
 Nov. 20. 22.  
 1846.  
 April 17.

BENNETT v. COOPER.

In 1816, *A.* mortgaged an estate to *B.*, and covenanted to pay the mortgage money; and,

IN this case, the Defendant was indebted to the Plaintiff in the sum of 1500*l.*, and to one *Ratcliffe* in the sum of 500*l.* (which had since been satisfied).  
 in July 1817, *A.* and *B.*, as his surety, conveyed the property to *C.*, on trust to pay, first, a debt due from *A.* to *C.*, which *A.* and *B.* also covenanted to pay, and, secondly, to pay *B.*'s debt. In August following, *A.* executed to *B.* an equitable charge on other property. In 1834, *C.* sold the estate, and applied the proceeds in part payment of his demand. In 1842, a bill was filed by *B.* against *A.* to remove the equitable charge. Held, that, until the trust of the deed of July 1817 was exhausted in 1834, the covenant in the deed of 1816 subsisted, wholly unaffected by time; that the debt and the personal remedy to recover it subsisted, at the time the bill was filed, and that the equitable charge was therefore then operative.

A deed poll in the form of a power of attorney, held, in equity, to amount to an assignment or to a covenant to assign.

Effect given to the equitable charge, for valuable consideration, upon express assignment.

the 1st of *January* 1816, the Defendant executed an indenture of mortgage, by way of demise for 1000 years, to the Plaintiff, with a proviso for redemption, on payment of the sum of 2000*l.*, which the Defendant covenanted to pay. These debts being still due to the Plaintiff, the Defendant contracted a debt of 1620*l.* 18*s.* 5*d.* to his bankers, for which the Plaintiff was his surety. Under these circumstances, the Plaintiff consented to join in securing the banker's debt, and to postpone to it the payment of his own mortgage; and on the 23d of *July* 1817, by an indenture, made between the Plaintiff of the first part, the Defendant of the second part, *Ratcliffe* of the third part, *Blurton & Co.* (the bankers) of the fourth part, and *Blair* of the fifth part, the mortgaged estate was conveyed to the bankers, on trust to sell, and apply the purchase monies in payment, first, of the costs; secondly, what should be due to *Ratcliffe* in respect of his 500*l.*; thirdly, what should be due to the bankers in respect of the 1620*l.* 18*s.* 5*d.*; and, fourthly, what should be due to the Plaintiff in respect of his 1500*l.*, and the surplus to the Defendant.

1845.  
BENNETT  
v.  
COOPER.

By the same deed, the Plaintiff and the Defendant jointly and severally covenanted to pay the debt due to the bankers, and the mortgage term, previously vested in the Plaintiff, was assigned to *Blair*, on trust to attend the inheritance.

Soon after the date of this deed, and on the 7th of *August* 1817, the Defendant executed a deed poll, whereby, after reciting his debt to the Plaintiff, and that the Plaintiff, as his surety, was liable to pay other sums on his account, and that several debts were due from other persons to the Defendant, for goods sold and delivered &c., and that he had considerable expectations from the relations and friends of himself and his wife, who might probably

1845.  
BENNETT  
v.  
COOPER.

probably give and bequeath to him and his wife certain legacies or sums of money, and that he was desirous, as far as he could, to secure the Plaintiff, it was witnessed, that, for such considerations, *the Defendant appointed the Plaintiff his attorney* irrevocable, in his name to demand, and, if necessary, to sue for and receive, all sums of money then or thereafter to become due to him, and all legacies or bequests, which had already or might thereafter be given or bequeathed to him or his wife, by any person whomsoever.

In 1823, the bankers took possession of the estate, and applied the rents to the Defendant's credit.

In 1834, they sold the estate, and applied the produce (so far as it would extend) in part payment of their mortgage debt.

In 1827 and 1839, certain bequests had been made to the Defendant *Cooper*, by some relatives, which the Plaintiff, by this bill, claimed to be entitled to under the deed poll of the 7th of *August* 1817.

In *October* 1842, the Plaintiff (being liable as surety under the deed of *July* 1817, and having such rights as were given him by the deed poll of *August* 1817,) filed this bill against *Cooper*, praying the establishment of the deed of *August* 1817, and seeking the recovery of the legacies so bequeathed to the Defendant, for payment of his debt and as an indemnity in respect of his suretyship to the bankers.

The Defendant insisted, by way of defence, first, upon an alleged partnership transaction between him and the Defendant, which he wholly failed in making out; and, secondly, on the statute of limitations.

The

The cause now came on for hearing.

1845.

BENNETT  
v.  
COOPER.

Mr. *Bagshawe* and Mr. *Rogers*, for the Plaintiff. Not only a *chase in action*, but even a mere possibility is assignable in equity (*Whitfield v. Fausset* (a), *Wright v. Wright* (b)), and no particular form of transfer is necessary. (c) The deed poll of August 1817, therefore, operated as an equitable assignment or charge upon the legacies afterwards bequeathed to the Defendant.

The statute of limitations is no defence to the claim of the Plaintiff, for as long as the Plaintiff, as surety, remains liable to the bankers, so long will he be entitled to indemnity from the Defendant. The trusts of the deed of July 1817 were in the course of performance until 1834, during which period, time could not run against the Plaintiff, whose rights were secondary to those of the bankers; besides this, the legacies were not receivable till 1837, and therefore, could not be sooner recovered. There are also admissions made by the Defendant which take the case out of the operation of the statute.

Mr. *Kindersley* and Mr. *Lewin*, for the Defendant. More than twenty years having elapsed before the filing of the bill, the debt is barred by the statute 3 & 4 W. 4. c. 42. (d) Being barred, the remedies on the collateral securities for the debt are also gone. The admissions relied on are insufficient to bring the case within the fifth section; *Tippets v. Heane* (e), *Mills v. Fowkes* (g), *Waugh v. Cope* (h), and they have not been charged by the bill, except in general terms.

The

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|--------------------------------------------------------------------------------|-------------------------------------|
| (a) 1 Ves. sen., p. 390.                                                       | sen., p. 332., and Lord Townshend   |
| (b) <i>Ibid.</i> p. 410., and see <i>Alexander v. The Duke of Wellington</i> , | v. <i>Windham</i> , 2 Ves. sen., 6. |
| 2 Russ. & Myl. 35., and <i>Lyde v. Mynn</i> , 1 Myl. & K. 683.                 | (d) Sect. 3.                        |
| (c) See <i>Row v. Dawson</i> , 1 Ves.                                          | (e) 1 Cr. M. & R. 252.              |
|                                                                                | (g) 5 Bing. N. C. 455.              |
|                                                                                | (h) 6 Mee. & W. 824.                |

1845.  
  
 BENNETT  
 v.  
 COOPER.

The bankers are not parties to the suit, and their claim is equally barred by the statute.

They also cited *Holland v. Clark* (a), *Philips v. Philips* (b), *Dearman v. Wyche*. (c)

Mr. *Bagshawe* in reply. You cannot treat the covenant as collateral to, or independent of the trust; the whole was one transaction. The application of the purchase money in 1834 was a part payment and a continuance of the performance of the trusts of the deed of 1816.

The MASTER of the ROLLS reserved his judgment.

1846.  
 April 17.

The MASTER of the ROLLS.

I find no evidence on which I can rely, that, at any time after the execution of the deed poll, the Defendant ever specifically acknowledged the debt of 1500*l.* due to the Plaintiff, or paid any interest on account of it, and this bill was not filed till *October* 1842, being twenty-five years afterwards.

But, upon the security of *July* 1817, the Plaintiff's debt was postponed to the bankers' debt, which was therefore, to be satisfied, before the Plaintiff could obtain for himself any benefit under the same deed, and in 1821, the Plaintiff paid the proceeds, or part of the proceeds, of the Defendant's goods, sold under a bill of sale, to the bankers, towards payment of the debt due to them from the Defendant.

In

(a) 1 *Y. & Col. (C. C.)*, 151.  
 (b) 3 *Hare*, 281.

(c) 9 *Simons*, 570.

In 1823, the bankers took possession of the estate comprised in their security, and applied the rents which they received to the credit of the Defendant in respect of the same debt.

1846.  
BENNETT  
v.  
COOPER.

In 1834, they sold the estate and received the purchase money, and (*Ratcliffe* having been satisfied) they applied the purchase money, so far as it would extend, in part payment of what remained due to them, in respect of their debt of 1620*l.* 18*s.* 5*d.*

Thus, in *April* 1834, the estate, which was intended to secure the banker's debt and also the debt due to the Plaintiff, was exhausted in part payment of the banker's debt, and the whole of the Plaintiff's debt remained, and still is, unsatisfied.

At this time, the Plaintiff had the covenant of the Defendant, contained in the deed of 1816. He had consented to assign his mortgage term and to postpone the payment of his debt, in consideration of the trust created by the deed of 1817, and which was not exhausted till *April* 1834. Whilst this trust was pending, and whilst he might expect to receive payment by means of it, and whilst steps were taking towards payment of the prior debt, until satisfaction of which he had no remedy for himself, it cannot, I think, be maintained, that time ran against him, so as to deprive him of the benefit of his own securities; and it appears to me, that until the trust was exhausted in 1834, the covenant remained in force, wholly unaffected by time.

The bill was filed in *October* 1842. It alleges that the Plaintiff had, in and after 1838, discovered that the Defendant had himself received several sums of money, which, by the powers given by the deed poll of *August* 1817,



1846.  
BENNETT  
v.  
COOPER.

1817, ought to have been received by the Plaintiff, and the Plaintiff prays, that the Defendant may pay over to him all such sums of money, as, under the deed poll, the Plaintiff was entitled to receive, as security for or in satisfaction of his debt.

The Defendant set up a defence, which, not being supported by evidence, is not available. At the bar, he relied on length of time, and insisted that the debt was barred, and that the deed poll, not having been acted upon for twenty years, has ceased to be operative.

Now the deed poll is admitted to have been executed for valuable consideration, and it seems to me to amount to an assignment of, or a covenant or agreement to assign the sums which the Plaintiff was empowered to receive, but it was, as to the principal debt, only a collateral security in aid of the trust to sell the estate, which was to be sold under the trust. It was intended to secure the debt, and ought, as it appears to me, to be considered operative so long as the debt existed, and having regard to the circumstances attending the debt, the covenant, the mortgage of the term, and ultimately the trust to sell, I think the debt, and the personal remedy to recover it, did subsist at the time this bill was filed, and, also, that the deed poll was then operative.

I must therefore declare, that the Plaintiff was, and is, entitled to the benefit of the deed poll, and direct an account to be taken of what is due to the Plaintiff from the Defendant, and of the sums of money which the Plaintiff was entitled to receive, and which have, in fact, been received by the Defendant, reserving further directions and costs.

1846.

LANCASHIRE v. LANCASHIRE.

January 24.  
April 17.

**THIS** case is reported *antè* (a) on a motion for a receiver, where the facts will be found sufficiently stated for the present purpose.

A motion was now made, on behalf of the Plaintiff, that the Plaintiff might have an issue or issues at law, to try whether he is the heir-at-law of *Sarah Lancashire*, and whether *Sarah* was the heiress of *John*, and whether the Plaintiff was the heir of *William*, and that the proceedings in the cause might be stayed until the issues had been tried or returned.

Mr. *Turner* and Mr. *E. Webster*, in support of the motion. The first point in this cause to be decided between the parties is this, whether the Plaintiff is or is not the heir-at-law, as represented by his bill. This is a preliminary question, which must in the first instance be determined; convenience then requires that it should at once be put into a course of investigation, and the practice of the Court warrants this course of proceeding. In *Fulagar v. Clark* (b), Lord *Eldon* said, "I have myself, in one or two instances, ventured to interpose, in very early stages of the cause, where a simple fact, legitimacy for instance, is to decide every thing." Again, Lord *Cottenham* considered such an application to be of ordinary occurrence. In the case of *Gompertz v. Ansdell* (c), he says, "to direct an issue of fact, upon an interlocutory application, is a very common proceeding in this Court;" and in

Where the Plaintiff's right depends on his being heir, the Court has jurisdiction to grant an issue to try that fact on an interlocutory motion. If the facts of the case make it proper, it is not very important, whether they appear on a motion for an injunction or receiver, or upon a direct motion for the issue.

Such an issue was refused, in a case where there was nothing but the bare assertion of the Plaintiff's heirship, on the one side, and the assertion of the Defendant's ignorance on the other.

On such a motion, affidavits of facts of which the Defendant by his answer professes to be ignorant are inadmissible.

*Middleton*

(a) *Antè*, p. 120.  
(b) 18 *Ves.* 483.

(c) 4 *Myl. & Cr.* 449.

1846.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

*Middleton v. Sherburne* (a), where the Plaintiff claimed as heir, an issue *devisavit vel non* was directed on motion. (b) This is a preliminary inquiry within the spirit and meaning of the 9th Order of the 9th of May 1839. (c)

Mr. *Kindersley* and Mr. *Rolt*, for *Ann Lancashire* and Mr. *Cantress*, for the trustees, opposed the motion. They argued that it was not the practice of the Court to grant issues of fact upon an interlocutory application though it might have been done where not opposed.

That the great inconvenience of such a proceeding was evident, from the circumstance, that, after all the expense and trouble of a trial had been incurred, the finding would not be binding on the parties, who might, notwithstanding, proceed to proof in the cause on the same point, from which the Court, at the hearing, might arrive at a contrary conclusion from that of the jury. That such was the case in *Gompertz v. Ansdell* (d), in which Lord *Cottenham* pointed out the objections to sanctioning a proceeding which would bind no one, unless the parties were put under an undertaking to abide the result. That such an undertaking could not be compelled upon motion.

Again, that at the hearing of this cause, the Court might decide in favour of the Defendant's construction of the power to settle, then the question of heirship would be immaterial.

That the necessity of making a general order, to enable a party to obtain an order for preliminary inquiries

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|-------------------------------------------------|-------------------------------------|
| (a) 4 Y. & Coll. (Ex.), 358.                    | <i>South Devon Railway Company,</i> |
| (b) See <i>Kent v. Burgess</i> , 11             | before V. C. K. Bruce, 17th Nov.    |
| <i>Sim.</i> 370. 377.; <i>Lewis v. Thomas</i> , | 1846.                               |
| 3 Hare, 26.; <i>Kay v. Marshall</i> ,           | (c) <i>Ordines Can.</i> 39.         |
| 1 Myl. & Cr. 373.; <i>Naylor v.</i>             | (d) 4 Myl. & Cr. 449.               |

quiries on motion, proved, that the previous practice had been otherwise, and under that General Order it had been decided, that where a party sues as next of kin, and the Defendant does not admit that he holds that character, the Court will not grant a preliminary inquiry as to who are the next of kin; *Topham v. Lightbody*. (a)

1846.  
  
 LANCASHIRE  
 r.  
 LANCASHIRE.

They also argued that the correspondence had been unfairly placed on the record, it having passed expressly "without prejudice;" *Cory v. Britton*. (b)

Mr. Turner, in reply.

*The MASTER of the ROLLS.*

It is so very important to observe uniformity in the practice of the Court, that if, on consideration, I should find that the case falls within the decision in *Topham v. Lightbody*, I shall certainly make no order inconsistent with that case. There are, however, two ways in which it may not fall within it. First, the case may be such, that if it were brought on for hearing without any further evidence than the answer, the Court might not think fit to dismiss the bill, but institute an inquiry, or direct an issue. The order asked might then be made, without trenching on the authority of *Topham v. Lightbody*.

Again, if the issue could be granted at this stage of the cause, independent of the authority of the Order of May 1839, then, considering that the case of *Topham v. Lightbody* was decided on the construction of that order, and it being, in this case, unnecessary to resort to it, then

(a) 1 *Harc*, 289., and see *Belcher v. Whitmore*, 7 *Beavan*, 245.

(b) 4 *Car. & P.* 462.

1846.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

then the order might now be made, consistent with  
*Topham v. Lightbody.*

I will read the pleadings and the statement of the pedigree, and see to what extent it is admitted by the answer, in order to see whether, if those circumstances in answer were before me, I should dismiss the bill merely on that ground, or put the matter in a course of investigation.

The other matters I will consider at the same time.

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April 17. *The MASTER of the ROLLS.*

If the Plaintiff should prove himself the heir which he represents himself to be, there are several questions to be considered, before he can make out his right to *al.* the relief which he asks.

If he should not prove to be such heir, he admits, and it is perfectly clear, he is entitled to no relief whatever.

If the cause should be brought on to a hearing, the first question will be, has the Plaintiff a *locus standi* as heir? And this is a question which the Court will not, probably, be able to decide, without directing an issue to be tried before a jury.

The Defendant *Ann Lancashire* does not deny, but says she does not know and cannot set forth, as to her belief or otherwise, whether *Sarah Lancashire*, the daughter of *John Lancashire*, did leave the Plaintiff her heir-at-law her surviving, or how the contrary is to be made out, or who was or is such heir-at-law, or whether the

the Plaintiff is also the heir-at-law of *John Lancashire* and *William Lancashire*, or either of them, or who was or is such heir-at-law, but she insists that the Plaintiff is not, as heir or otherwise, entitled to the trust premises in question, and alleges, that the power given to her and *Hutchinson* by the will of *William Lancashire*, to convey, assign and settle the trust estate, monies and premises, as therein mentioned, was a subsisting power, notwithstanding the death of *Sarah Lancashire*. She says, that she was so advised, and that the deed of the 1st of *November 1842* was executed accordingly.

1846.  
  
 LANCASHIRE  
 v.  
 LANCASHIRE.

The sum of the pleadings is, that the Plaintiff insists that he is heir, and alleges that his title, as heir, is better than the right of *Ann Lancashire* under her deed, and the answer is, that she does not know whether the Plaintiff is heir or not, but if he is, her title under the deed is better than the Plaintiff's title as heir. It is evident, that the first question, and that which must be determined before the other can be tried, is, whether the Plaintiff is heir, and in this state of things, upon the coming in of the answer, he asks for an issue to try that question.

There would, I think, be great convenience in granting the application. If the Plaintiff has only a *prima facie* case, an issue must, in the end, be granted; and it appears from the case of *Goulden v. Lydiat* (a), from what was said by Lord Eldon in *Fullagar v. Clark*, from the case of *Middleton v. Sherburne*, and even from the case of *Gompertz v. Ansdell*, that the Court has jurisdiction to grant such an issue on an interlocutory motion; but the circumstances which ought to induce the Court to exercise the jurisdiction are, necessarily, the subject of

great

(a) 4 Y. & Col. 374. n.

1846.  
 LANCASHIRE  
 v.  
 LANCASHIRE.

great consideration. If the facts of the case make it proper, I cannot think it very important, whether they appear on a motion for an injunction or receiver, upon a direct motion for the issue; but there ought to be facts appearing in some shape to warrant the order. Now, on examination of the pleadings in this case, it seems, that there is nothing but the bare assertion of the Plaintiff, on the one side, and the assertion of the Defendant's ignorance on the other. The Plaintiff has indeed set forth his pedigree at large, but the Defendant has admitted no more than that part of the statement which immediately relates to the descendants of her husband's father. Of all the rest, all that connects the Plaintiff with the family of *Sarah*, she professes herself to be ignorant. If the rules of the Court allowed me to receive affidavits of the facts distinctly alleged in this bill, and of which the Defendant by her answer professes herself to be ignorant, what is asked might perhaps be rightly allowed, but in this case the Plaintiff is obliged to move on the answer alone. (a)

It is probable, that the inconvenience pointed out by Lord *Cottenham* in *Gompertz v. Ansdell* might be avoided, by requiring the Plaintiff to consent to be bound by the decision of this Court, on the verdict to be obtained on the trial of the issue, leaving it to the Defendants to go into evidence in this cause, if they should be advised to do so; but in the absence of any facts from which a sufficient presumption in the Plaintiff's favour arises, I think that I must, though I own with considerable reluctance, refuse the motion, directing the costs to be costs in the cause.

(a) See *Edwards v. Jones*, 1 *Phillips*, 501.

1846.

TURNER v. HODGSON.

Jan. 16. 20.

**A** TESTATOR devised his estates to trustees for his widow for life, and after her death, to sell and divide between his brothers and sisters then living, or their children.

An accidental slip in a decree directing a sale, if certain persons "and the heir-at-law" should be found parties, corrected, on petition, by substituting the words "other than the heir-at-law."

A suit was instituted to carry into effect the trusts of the will, but it did not seek to establish the will against the heir-at-law.

By the decree, inquiries were directed as to the class entitled on the death of the widow, and who was the heir-at-law of the testator, and if the Master should find all the parties thereinbefore inquired after, *and the testator's heir-at-law were parties to the suit*, then he was to inquire of what freehold the testator was seised, and in whom the legal estate was vested, and the decree then proceeded to direct a sale.

After the decree had been drawn up and a sale had been made, it was discovered, that the sale of the estate had accidentally been made contingent on the heir being a party to the suit, which was contrary to the intention. A petition was presented to vary the decree, so that the sale might take place notwithstanding the heir was not a party.

Mr. Kindersley asked that the decree might be varied by directing a sale if the persons inquired after, "other than" the heir-at-law were found to be parties. He referred to the 45th General Order of April 1828. (a)

The

(a) Ord. Can. 21.



1846.

TURNER  
v.  
HODGSON.

The MASTER of the ROLLS said he had read the petition, and he thought that the decree might be amended as asked by Mr. Kindersley. Jan. 20.

Jan. 19, 20.

THE MARQUIS OF HERTFORD v. LORIMER  
LOWTHER.

Legacy to A., on condition that she gave 3000*l.* to purchase an annuity for B. In consequence of a litigation between A. and the residuary legatees, A. did not, for several years, obtain possession of the legacy, which did not, in the mean while, make interest. Payment to B., who elected to take the 3000*l.* in lieu of the legacy, was consequently postponed. Held that interest on the 3000*l.* was payable by A. to B. from the end of a year after the testator's death.

THE Marquis of Hertford, by his will, gave to the Countess Zichi Ferraris "all the goods and chattels, plate, linen, money at the banker's, or stock in the Monte di Milano, horses, carriages, &c. he might die possessed of at Milan or in Lombardy, on condition she gave 3000*l.* sterling to the Casa d'Assicurazione to make an annuity for the life of Angelique Felicite Borel."

The testator died on the 1st of March 1842. In consequence of the decision, *antè (a)*, no part of the property held to pass by this gift carried interest; and from disputes which had arisen, possession of this property had not, until lately, been delivered to the Countess.

The Master, by his report, dated in May 1843, found, that the executors admitted assets, and that Madame Borel was entitled to the legacy of 3000*l.*, out of the testator's goods and chattels at Milan or in Lombardy, and for interest thereon from the 1st day of March 1843 to the 11th of May 1843, at 4 per cent., the sum of 23*l.* 6*s.* 10*d.*, which being added to the said

(a) 7 Beavan, 1.

said sum of 3000*l.*, they made together the sum of 3023*l.* 6*s.* 10*d.*

1846.  
The  
Marquis of  
HERTFORD  
v.  
Lord  
LOWTHER.

This report was confirmed, and a petition having been presented by Madame *Borel* for payment of the legacy and interest, it was, by consent, ordered, on the 8th of April 1845, that the sum of 3000*l.* should be paid the petitioner by the executors, out of any pecuniary legacies payable to the Countess *Zichi*; and the Court "thereby reserved the consideration of so much of the matter of the said petition as sought the payment of interest of the said legacy, and any of the parties were to be at liberty to apply."

The Lord Chancellor having affirmed the decision of the Master of the Rolls as to the Polish bonds, a petition was now presented by Madame *Borel*, praying payment of the interest on the 3000*l.*

Mr. *Koe* and Mr. *Rudall*, in support of the petition, argued, that the petitioner, having been kept out of her legacy by disputes between other parties, was entitled to interest, either from the Countess *Zichi* who took her legacy subject to the condition of satisfying the petitioner's claim, or from the residuary legatee out of the general estate of the testator, and that it should be calculated either from the death of the testator or from a year afterwards. That interest was given by the report, and must be continued to the time of payment.

Mr. *Kindersley* and Mr. *Schomberg*, for the residuary legatee, contended, that the petitioner was not entitled to the interest asked, and that if she were, then that her remedy was against the Countess *Zichi*, who had possessed the property out of which it was payable.

Mr.

1846.  
 The  
 Marquis of  
 HERTFORD  
 v.  
 Lord  
 LOWTHER.

Mr. *Turner* and Mr. *Tripp* for the Countess *Zichi*.  
 The petitioner cannot be entitled to interest, as against the Countess, unless the latter has made interest has been guilty of some default. Now the property question has not made interest during the period, and in consequence of the pending litigation the Countess has been kept out of the possession and enjoyment of it. It would be unjust, therefore, to charge the Countess with interest; and if any be payable, the charge ought to be borne by those who have had the possession of the property during the period. Though the Master's report gives interest, still, by the consent order, the question of interest is left open, and the Countess was not a party to the cause.

Mr. *Follett* for the executors.

*The MASTER of the ROLLS* (without hearing a reply).

What I wished to know was, how it happened that, after the Master had found that the lady was entitled to interest, and his report had been confirmed, any question could arise as to whether she was to be paid interest.

Taking the order as it stands, and the explanation given me, I think it must have been understood, that the subject of interest should be afterwards considered, and that the Master's report was not to be absolutely binding upon the parties.

The question now opened and argued is, that this was a legacy given on a condition, and that the condition has been complied with as soon as it ought. I cannot, after careful consideration, think that it is so. It is a gift of a legacy to the Countess *Zichi*, subject to the payment of an annuity to be purchased with 3000*l*. The annuitant has, however, exercised an option to take the

the benefit as a pecuniary legacy. I am of opinion, on reading the terms of the gift, that she is entitled to interest at 4 per cent, from one year next after the death of the testator, and that this sum is payable out of the gift to the Countess *Zichi*, together with the costs.

1846.  
The  
Marquis of  
HERTFORD  
v.  
Lord  
LOWTHER.

*In re BIGNOLD.*

1845.  
Nov. 7.

**T**HE petitioner, Mr. *Roper*, executed a mortgage to the trustees of the *Norwich Union*, with power of sale in default of payment.

A mortgagee's solicitor retained the amount of his bill of costs out of the produce of the sale of the mortgaged estate, and he charged the amount in an account delivered to the mortgagor. Held that an order for taxation within twelve months might be obtained as of course, and a special petition having been presented for that object, the order was made, but the petitioner was ordered to pay the costs.

The property was sold under the power, and the produce was received by Messrs. *Bignold*, the solicitors of the *Norwich Union*.

In November 1844, a cash account, containing the particulars of the produce of the sale, and a bill of costs, were delivered by Messrs. *Bignold* to the petitioner. The bill of costs amounted to 650*l.* 4*s.* 3*d.*, and the amount was debited in the cash account. Upon the cash account, there appeared, after such deduction, to be a balance of 12*l.* 15*s.* 5½*d.* due to the petitioner.

On the 12th of August 1845, the petitioner, Mr. *Roper*, presented a special petition for the taxation of the bill. The petition stated, that the petitioner never authorised the retainer of the costs, and it specified items of alleged overcharge. Having been presented within the twelve months, the question was, whether a special petition was necessary, or whether a common order might not have been obtained for the taxation of the bill.

Mr.

1845.  
  
*In re*  
 BIGNOLD.

Mr. *Elmsley*, in support of the petition, contended that the fact of the retainer of the amount of the bill costs by the solicitors, as against his clients, rendered special application necessary.

[*The MASTER of the ROLLS*. You say that the solicitor, as between himself and client, has retained the amount of his bill. I have never, hitherto, considered, that the mere retainer by a solicitor, out of monies in hand, of the amount of his bill, amounted to a payment, unless there has been a settlement of account.

If a payment is relied on, it should be distinctly stated in the petition and proved. Here, the allegation is that a solicitor, having monies in his hands, takes credit for it. It is an item in the account, but cannot be relied on by a solicitor as a payment.]

Mr. *Kindersley* and Mr. *Rogers*, *contra*. The application for taxation being made within twelve months from the delivery of the bill, an order of course might have been obtained; *In re Gaitskell*. (a) The petitioner ought, therefore, to pay the costs of this special petition. (b) They also referred to the statute 6 & 7 *Vict. c. 73*.

Mr. *Elmsley*, in reply.

*The MASTER of the ROLLS*.

The question in this case arises entirely under the 6 & 7 *Vict. c. 73*., which gives jurisdiction to the Court to

(a) 1 *Phillips*, 576., and see *In re Bromley*, 7 *Beavan*, 487.; (b) See *In re Bracey*, 8 *Beavan*, 266.  
*Holland v. Gwynne*, 8 *Beavan*, 124.

to order the taxation of a solicitor's bill at the instance of third parties liable to pay it. I have often had occasion to observe, that this act in no way alters the relation between a solicitor and his client. A mortgagor has a right to have a taxation of the mortgagee's solicitor's bill, because he is liable to pay it; but if the mortgagee thinks fit to settle with his solicitor and pay him, then, although the right of the mortgagee to charge the full amount against the mortgagor is left quite open, the mortgagor cannot, as of course, open that settlement and say, "The matter is still open, for the bill has never been settled as between me and the mortgagee's solicitor." The solicitor has a right to say, "I never acted as your solicitor; I have fairly settled all matters with my own client, and am not liable to account again to you."

1845.  
In re  
BIGNOLD.

The mortgagor would not, in such a case, be without remedy, for in the settlement between the mortgagor and mortgagee, every improper payment made by the mortgagee to his solicitor would be disallowed, and that is the regular course of proceeding.

There is this difficulty in the present case: if there has not been a settlement, then the petitioner is entitled to obtain an order of course for the taxation of the bill. A party presenting his petition for an order for taxation acts wisely by stating all the circumstances material to his case, and it will then be considered in the Secretary's Office, where these matters are looked into, whether an order can or cannot properly be made as of course. Here the case stands thus,—there has been an account stated but not settled. There has been nothing finally concluded, and the mortgagor comes for a special order for taxation. He is entitled to the order, but he must pay the costs.

1846.

Jun. 21.

In re BOLTON.

In drawing up a decree, the word "inquiry" was erroneously inserted for the word "sale." It became necessary for the Defendant to make an application to correct the error. Held that the solicitor of the Defendant must bear the costs.

THIS was a petition by way of appeal from the decision of the Taxing Master.

Mr. *Bolton* acted as the town agent of *Allford & Co.*, solicitors, resident in the country, in a suit of *Askeu v. Peddle*, in which *Allford* was a Defendant. It was arranged between the parties to the suit, that a decree should be taken, according to minutes agreed upon between them, which minutes provided, amongst other things, that a reference should be made to the Master to enquire whether the Defendant *Allford* had any and what *lien*, &c. on the canal shares, &c. in the pleading mentioned: and the sales previously directed by the decree were to be without prejudice to such *lien*, if any.

In drawing up the decree, the word "inquiry" was accidentally inserted for "sale." A copy of the decree was sent by *Bolton* to *Allford & Co.*, who discovered the error, and brought it to the attention of *Bolton*. *Bolton* thereupon applied to Mr. *Burford*, the solicitor of the Plaintiffs, who promised to get the mistake rectified; and *Bolton*, relying on that assurance, wrote to Messrs. *Allford*, desiring them to alter their copy of the decree accordingly.

*Burford* did not get the error corrected, and became incapacitated by ill health from doing so. The conduct of the suit passed into other hands, and the new solicitor, declining to make the alteration, insisted on the benefit of the decree as it stood; it therefore became necessary to apply to have the decree corrected.

*Bolton* accordingly presented a petition for that purpose, in the name of Mr. *Allford*, and the alteration was made, but costs were incurred in the proceeding.

1846.  
In re  
BOLTON.

Messrs. *Allford* afterwards obtained an order for the taxation of *Bolton's* bill of costs, and in the taxation, the Master allowed 25*l.* 19*s.* 8*d.* for the costs of the petition to rectify the decree. Messrs. *Allford* now presented a petition for a review of the taxation, and for a declaration that the costs of the petition ought to be disallowed.

Mr. *Turner* and Mr. *W. M. James*, in support of the petition, contended, that the Taxing Master had come to a wrong conclusion in allowing to a solicitor the costs of a petition to rectify an error caused by his own negligence; that the expense ought to be borne by *Bolton* personally, especially as notwithstanding his attention had been expressly called to the error, he had not seen to its correction.

Mr. *Kindersley* and Mr. *W. H. Clarke*, *contra*, contended, that *Bolton* was not liable for an accidental error in drawing up the decree, which had not originated with him; that he had taken all proper steps to correct it, by applying to the Plaintiff's solicitor, who would have removed the error, had he not been prevented by a visitation of Providence; and that it appeared, from the conduct of Mr. *Allford*, that he had exonerated *Bolton* from all liability.

*The MASTER of the ROLLS.*

I cannot help regretting the position in which Mr. *Bolton* is placed, because it has been occasioned from no misconduct, but from a reliance in the promise of a gentleman



1846.

*In re*  
BOLTON.

gentleman of the highest respectability, which I am satisfied would, but for his unfortunate affliction, have been strictly performed.

- That promise not having been fulfilled, the decree is found to be incorrect, and this expense has been occasioned. I cannot think that *Bolton* is entitled to charge the expense of correcting the error against his principals in the country; and on looking at the correspondence, I am of opinion, that nothing has occurred, whereby Mr. *Allford* has, by himself or his agents, exonerated *Bolton* from his liability to correct the error.

Instead of sending the matter back to the Taxing Master, I will, if there be no objection, order payment of the amount found due after deducting this sum.

Mr. *Bolton* is entitled to the costs of the taxation.

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1845.

THOMAS v. GWYNNE.

Nov. 20.

THOMAS v. THOMAS.

1846.  
Feb. 17.

**I**N this case, an estate had been sold for payment of the testator's debts, and an infant devisee had (amongst other persons) been directed to convey to a purchaser. The infant refused to convey, and an attachment issued to compel him. (a) The infant was taken, but was afterwards rescued from the sheriff, and had not been since heard of.

An infant devisee had been ordered to convey real estate sold for payment of the testator's debts. He made default, and was not amenable to process. The Court, under the 1 W. 4. c. 60. s. 8., directed a person to convey in his place.

Mr. Piggott now applied to the Court to appoint some person to convey on behalf of the infant. He referred to the statutes 1 W. 4. c. 36. s. 15. rule 15., 1 W. 4. c. 47. s. 11., and 1 W. 4. c. 60. ss. 6. 8. 13. 18., and argued that the infant was a trustee under the 1 W. 4. c. 60. He cited *Prendergast v. Eyre* (b), *Warburton v. Vaughan*. (c)

*The MASTER of the ROLLS.*

There seem to be three modes of proceeding, first, under the contempt act, 1 W. 4. c. 36., which authorises the Court to appoint one of the Masters to execute the conveyance, but there the party required to execute must be in prison; secondly, under the 1 W. 4. c. 47., where the infant must himself convey; and, thirdly, under the trustee act, 1 W. 4. c. 60. (d), which enables the Court, in certain cases only (e), to appoint a person to convey

(a) See 8 *Beavan*, 312.

(b) 1 *Ld. & Go.* 11.

(c) 4 *Y. & Col. (Ex.)* 247.

(d) Extended by the 4 & 5 W. 4. c. 23., and 1 & 2 *Vict.* c. 69.

(e) See the 8th sect.

1845.

THOMAS

v.

GWYNNE.

convey for a trustee. You must bring yourself with ~~in~~ in the act you intend to rely on.

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The case stood over.

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1846.  
Feb. 17.

Mr. *Piggott* again applied, that some person might be appointed to convey for the infant. He argued, ~~that~~ that the decree having ordered the infant to convey, the infant had become a trustee, and that not being ~~amen~~ able to process, the Court, under the eighth section of 1 ~~W.~~ 4. c. 60., had power to direct a person to convey in ~~the~~ place of the infant.

The MASTER of the ROLLS made the order.

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Feb. 28.

## YEARWOOD v. YEARWOOD.

Bequest of 2000*l.* to *A.*, and in the event of her death without children, to her heirs, the nearest relations of her grand aunt *A.* Held, that *A.* took an absolute interest.

THE testator gave all his property to a trustee, in trust for the following purposes:—"That he shall pay to my godchild *Anna*, daughter of my cousin *Catherine De Weever*, and Mr. *De Weever* (whose name I think is *Cornelius De Weever*), the sum of 2000*l.*, for which I hold Mr. *Scott Murray's* note of hand, and in the event of her death without children, to her heirs, the nearest relations of her grand aunt *De Weever*, from whom I received a legacy."

The legatee, *Anna De Weever*, married Mr. *Yearwood* and had a child. The bill was filed by Mrs. *Yearwood*

*wood* against her husband and her child, claiming the fund absolutely.

1846.

YEARWOOD

v.

YEARWOOD.

**Mr. Kindersley** and **Mr. Freeling**, for the Plaintiff, argued that the legatee took absolutely. That the gift was clearly absolute in the first instance, and that as the Court could not give effect to the gift over to her heirs, being the nearest relations of a grand aunt, the first absolute gift remained.

**Mr. Phillips**, for the child of the marriage.

*The MASTER of the ROLLS.*

**I** do not find any ground for taking the absolute gift away from the Plaintiff.

ARMSTRONG v. STORER.

March 3. 10.

April 20.

**THIS** suit was instituted in 1823, by *Armstrong* and others, on behalf of themselves and the other creditors, for the administration of the estate of *Anthony Gilbert Storer* deceased.

The Master made a report not strictly following the order of reference, but, no objection or exception having been taken thereto, it had been confirmed. A party to the suit afterwards petitioned, on

In June 1827, a decree for an account was made, but before report, and in 1830, the suit abated by the death of *Lewis Bazalgette*, who was a Defendant. In 1832,

*Evelyn*

the ground of the informality, to discharge the orders nisi and absolute confirming the report, but it was dismissed.

A creditor's bill was filed by *A.*, on behalf of himself and other creditors, against *B.* and others. After decree, the suit abated by the death of *B.* *C.*, his executor, filed a bill of revivor on behalf, &c., and the suit was revived. *A.* afterwards filed other bills, and the proceedings before the Master were attended by *A.* on behalf of the creditors at large. Held, that *C.* was not, by the fact of filing the bill of revivor on behalf, &c., incapacitated from compromising for his own benefit, a claim on the estate.

1846.  
  
 ARMSTRONG  
 v.  
 STORER.

*Evelyn Bazalgette*, the executor of *Lewis Bazalgette*, filed a bill of revivor on behalf, &c., and an order to revive was obtained in *January 1835*. In *August 1835*, the Plaintiff, *Armstrong*, also filed a third bill to revive the suit, and also a fourth bill.

*Joseph Stone Williams*, deceased, had been the receiver of the estate in *Jamaica*, and his representative, *James Grant*, claimed a considerable sum due to him, and he sought to obtain payment out of a fund in Court arising from slave compensation.

By an order, dated the 12th of *January 1841*, made on the petition of *James Grant*, it was referred to the Master to inquire whether *James Grant*, the petitioner, had any lien, charge, or incumbrance (by virtue of an order, dated the 2d of *May 1838* or otherwise), upon the compensation money in the petition mentioned, or any part thereof; and in case he should find that the said *James Grant* had any such lien, charge, or incumbrance, the Master was to ascertain the amount thereof; and was also to inquire, whether there were any and what other claimants upon the said compensation monies, or any part thereof, having claims prior to the petitioner *James Grant*, or entitled to rank equally with him, and to ascertain the amount thereof.

The order of the 2d of *May 1838*, referred to in this order of reference of the 12th of *January 1841*, was an order of the Court of Chancery in *Jamaica*. The compensation money therein mentioned, consisted of certain sums transferred or brought into this Court by the Commissioners of *West India Compensation*.

The reference was regularly proceeded with before the Master, and was duly attended by all parties. *Grant*, as the executor of *Joseph Stone Williams*, claimed  
 to

1846.

ARMSTRONG  
v.  
STORER.

to be entitled, as against the estate in question, to the sum of 3654*l.* 2*s.* and interest from the 30th of *April* 1837; and it appeared, that by the order of the 2d of *May* 1838, it was ordered and directed, that the Accountant General of the High Court of Chancery in *England*, or other the proper person, should, in the first place, out of the compensation money received in respect of the claims therein mentioned, pay or transfer to *James Grant*, the sum of 3654*l.* 2*s.*, together with interest thereon, at the rate of 6 per cent. from the 30th day of *April* 1837; and the Master (as it was expressed in his report), found it charged, that by the order of the 2d of *May* 1838, and under the circumstances in his report stated, *Grant*, as representing *Joseph Stone Williams*, had a primary lien and charge to the extent of the sum of 3564*l.* 2*s.* and interest thereon, and certain costs. The Master then found, that by an indenture, dated the 11th of *August* 1845, made between *James Grant* of the first part, *Theodore Williams* of the second part, and *Evelyn Bazalgette* of the third part, reciting the claim of *Grant*, that *Evelyn Bazalgette*, as representative of his father *Louis*, claimed to be entitled to payment of large sums from the real and personal estate of *Anthony Gilbert Storer*, and disputed the claim of the personal representative of *Joseph Stone Williams*, and that an agreement for a compromise was entered into between the parties, subject to the sanction of this Court, in a cause in which *Frances Bazalgette* and others were Plaintiffs, and the said *Evelyn Bazalgette* was a Defendant, and which was afterwards approved of by the Court on the behalf of the parties to that cause. The effect of the compromise and deed was, that the claim of *Grant* was to be assigned to *Evelyn Bazalgette*, and that out of the first monies to be received, the sum of 1700*l.* and interest were to be paid to the legal personal representatives of *Joseph Stone Williams*. The Master then proceeded to state, that

1846.  
ARMSTRONG  
v.  
STORER.

having stated the state of facts and case, he was of opinion and found, that *Evelyn Bazalgette* (under and by virtue of the agreement with *James Grant* and *Theodore Williams*, dated the 11th day of *August* 1845), had, in the place of *James Grant*, a lien, charge, and incumbrance, by virtue of the order bearing date the 2d of *May* 1838, in the petition mentioned, to the extent of 3654*l.* 2*s.* for principal money, and 1859*l.* 12*s.* 2*d.* for interest thereon; and that there was not any other claimant upon the said compensation money having claims prior to *James Grant*, or entitled to rank equally with him.

No objection was carried in to the draft of the report, nor was any exception taken, and on the 15th of *December* last, the report was duly confirmed, and Mr. *Evelyn Bazalgette* petitioned to have paid to him the money which the Master had found to be due to him in the place and stead of *James Grant*.

When the petition came on to be heard, several objections were made to the report, on the behalf of *Ann Katherine Storer*, and it appearing that the report was not strictly confined to the matter referred to him by the order of reference, she had leave to present a petition for any relief to which she might be entitled; and she accordingly presented a petition, praying for a discharge of the orders *nisi* and absolute to confirm the report, and praying a reference back to the Master to review the report.

Mr. *Teed* and Mr. *Roupell*, in support of the petition, raised two objections to the report; 1. That the Master was only authorised to report on the claim of *Grant*, and that so much of the report as related to the compromise with *Bazalgette* and his claims was irregular, and made without authority.

2. That

2. That, as *Evelyn Bazalgette* filed a bill of revivor on the behalf of himself and the other creditors of *Anthony Gilbert Storer*, against *Ann Katherine Storer* and the other Defendants, he could not be allowed to make a compromise with *Grant* for his own benefit, and that the benefit of the agreement ought to enure to the testator's estate, for the benefit of all the creditors.

1846.  
  
 ARMSTRONG  
 v.  
 STORER.

Mr. *Turner* and Mr. *Elmsley*, *contra*.

The MASTER of the ROLLS reserved judgment.

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The MASTER of the ROLLS.

April 20.

It must be admitted, that the report does not strictly follow the order of reference. It does not find that *Grant* is entitled as the order requires, but that *Bazalgette*, in the place of *Grant*, is so entitled. The finding of the Master is, in effect, that it was charged before him that *Grant* was entitled, but there was some dispute between him and *Bazalgette*; that upon a compromise, *Grant* assigned his claim to *Bazalgette*, and thereupon *Bazalgette*, in the place of *Grant*, became, and the Master finds him, entitled. I own I think it would have been better to have obtained authority for the Master to make this special statement. The report was open to objections and exceptions in the regular course, and would no doubt have been corrected, if desired by any party; but considering that the proceeding and the preparation of the report took place in the presence of all parties, of the Plaintiffs representing the creditors at large, of Mrs. *Storer* the legal personal representative of the debtor, and herself a claimant, and of the other Defendants to the cause; considering also, that there was not only no exception or objection to the report,



1846.  
 ARMSTRONG  
 v.  
 STORER.

report, that no question was raised upon it, and that no reason or excuse whatever is given for not bringing the matter under the Master's consideration, and that it is not even alleged, in this petition, that the Master has committed any error of fact or of law in the finding, the objection appears to be merely formal. If necessary for the sake of justice, the objection would have been properly attended to; and if justice does not require it, it ought not to have weight on such an occasion as this. As Lord Hardwicke said, in the case of *The Earl of Bath v. The Earl of Bradford* (a), "I am prayed, in an extraordinary manner, to open this report which is absolutely confirmed, without exception and without any objection laid before the Master before the making of the report, in order to ground any exception. Ought the Court to do it, when they see substantial and material justice done? Certainly not upon any point of formality," &c. I am therefore of opinion, that upon this point of form, taken by itself, the petition of Mrs. Storer cannot be supported.

But the petitioner says, that the situation of *Bazalgette* is such, that he ought not to be allowed to retain for himself the benefit of the agreement. The allegation assumes, that the difference between the claims allowed to *Bazalgette*, and the sum to be paid out of by *Bazalgette* to *Grant*, or *Theodore Williams*, is a profit to *Bazalgette*; this is merely gratuitous assertion, unsupported by any evidence. But upon considering the situation of the parties, and the mode in which this suit has been conducted, it appears, that the first of the four bills filed in the cause, was filed by *Armstrong* and others, on the behalf of themselves and all other creditors of *Anthony Gilbert Storer*; that after decree,

an

(a) 2 Ves. sen. 591.

an abatement took place, and *Evelyn Bazalgette*, the representative of *Louis Bazalgette* the elder, filed a bill of revivor, which is the second bill, and an order to revive was obtained in *January* 1835; that in the following month of *August*, the original Plaintiff, *Charles Armstrong* and others, filed the third bill, to which *Evelyn Bazalgette*, the Plaintiff in the second cause, was a Defendant, and also the fourth bill, to which *James Jeffries* was Defendant; and the proceedings before the Master were attended, on behalf of the creditors at large, by the Plaintiffs in the first, third, and fourth causes, and that *Evelyn Bazalgette* did not (except in obtaining the order to revive) act on the behalf of the other creditors. The foundation of the claim set up by *Mrs. Storer* in this respect fails.

1846.  
  
 ARMSTRONG  
 v.  
 STORER.

If it had appeared, that it was the duty of *Evelyn Bazalgette* to protect the interests of the creditors at large, if the interests of the creditors had not been attended to by the Plaintiffs, and the interests of herself, and the estate of *Storer* had been neglected by *Mrs. Storer*, because she relied on the attention of *Evelyn Bazalgette*; and if it had further appeared, that, in those circumstances, the Master had been induced to find, that *Bazalgette*, in the place of *Grant*, was entitled to claim under the order of 2d *May* 1838; and if this matter had been shewn to the Court in a proper manner, there might have been ground for some interference. But this petition does not even allege, that *Grant* was not entitled to all that the Master has found to be due to *Bazalgette* in the place of *Grant*, but relies solely on the alleged irregularity of the report, and the alleged incapacity of *Evelyn Bazalgette* to enter into such a contract for his own benefit.

I think that the petition ought to be dismissed.

1846.

Feb. 22, 23,  
24. 26.  
April 18.

## CLARKE v. TIPPING.

Fraudulent accounts between a principal and factor opened from the beginning, the Court holding that the relief ought not, under such circumstances, to be limited to a right to surcharge and falsify.

Amongst the most important duties of a factor, are those which require him to give to his principal the free and unbiassed use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of others. A factor having violated all these and other duties, held, that no credit was due to his accounts, and that the principal was not bound by them.

*A. B.*, being in embarrassed circumstances, conveyed property to trustees to sell and pay his creditors (parties thereto) in proportion. *A. B.* afterwards instituted a suit against one of such creditors for the purpose of taking the accounts of such creditors, and to cut down the estimated amount of his debt. The other creditors were served with copy bill. Held, that as the other creditors were bound by the proceedings, the suit was not imperfect for want of parties, and a decree was made, without prejudice to the right of the other creditors, to any sum which the Plaintiff might recover on taking the accounts.

THE Plaintiff in this cause, being a miller and dealer in corn and meal at *Carlow*, in *Ireland*, employed the Defendant as his factor in *Liverpool*, and from time to time, from the year 1831, consigned goods in the way of his trade to the Defendant, to be sold on his account, on a commission of 4 per cent for which the Defendant was to guarantee to the Plaintiff the prices of the goods sold. The Defendant, from time to time, accounted to the Plaintiff for his alleged receipts and payments on his account, and the transactions continued till about the year 1841, when the Plaintiff became embarrassed in his circumstances, and on the face of the account, as represented to subsidiary between him and the Defendant, he appeared to be indebted to the Defendant to the extent of about 2300*l.*

The Plaintiff entered into an arrangement with his creditors to the effect following:—

The Plaintiff, by deed dated the 2d of *December* 1840, assigned to trustees, property, estimated amount to 5250*l.*, upon trust to sell and to divide amongst

amongst his creditors, parties to a deed poll of the 20th of November 1840, in proportion, according to their respective demands, which were in the whole estimated to amount to 7600*l*.

1846.  
CLARKE  
v.  
TIPPING.

By the deed poll, which recited that the Plaintiff was indebted to the several persons named in the schedule, in the several sums set opposite their names in the schedule, the Defendant and the other creditors, to the number of fourteen, released the Plaintiff from all claims and demands. No amount was set opposite the Defendant's name in the schedule, but in the arrangement the Defendant's debt was considered as amounting to 2300*l*.

The Plaintiff having, as he alleged, discovered that the Defendant had not acted fairly or accounted fairly, in his transactions as the Plaintiff's agent, filed this bill for relief in *July* 1841; and he alleged, that the accounts of the Defendant were, in several respects, erroneous and fictitious. That, instead of acting as factor to sell for the Plaintiff to others, he was sometimes himself the purchaser. That in his account of sales, he did not state the true quantities sold. That he charged for insurances which were never effected, and charged for expenses which were never incurred; and sometimes mixed the Plaintiff's goods with other goods of inferior value, and gave to the Plaintiff credit only for the price at the rate of which the mixture was sold. There were other charges which, at present, it is unnecessary to notice.

The bill prayed, that a general account might be taken of the dealings and transactions between the Plaintiff and the Defendant, the Plaintiff being willing that the Defendant (if any thing should be found due to him on taking the accounts), should receive satisfaction for the same, according to the arrangement of the year 1840, in

1846.  
 CLARKE  
 v.  
 TIPPING.

the manner provided for by the indenture of the 2d December 1840; and that it might be declared, that release of the 20th of November 1840, was binding the Defendant.

The other creditors who had been parties to arrangement, had not originally been made parties the suit. The Defendant put in a demurrer for want of equity and for want of parties, which was overruled by the Master of the Rolls, and by the Lord Chancellor on appeal. (a)

The Plaintiff afterwards amended his bill and stated that he had paid off two of the creditors, and had taken an assignment of their claims; he made the other creditors parties, but instead of requiring them to appear and answer in the usual way, he served them with copies of the bill, under the 23d General Order of August 1841. (b)

The Defendant *Tipping*, by his answer, admitted the irregularities complained of, in the manner stated in the judgment of the Court (c), and to which, to avoid repetition, the reader is referred. The Defendant also insisted, that the Plaintiff "had stated, settled, and agreed with the Defendant, all accounts between them, and ascertained the amount of the debt due to the Defendant; and that he ought not now to be permitted to disturb such settlement." He also insisted, that the other creditors who had executed the deed were necessary parties.

The object of the Defendant's evidence was to prove the adoption and settlement by the Plaintiff of the accounts rendered from time to time; that the Defendant had acted according to the usage and custom of the trade

(a) 4 *Beavan*, 588.

(b) *Ordines Can.* 171.

(c) *Post*, p. 287.

trade, and that the other creditors had come into the arrangement on the faith of 2311*l.* being due from the Plaintiff to the Defendant.

1846.  
CLARKE  
v.  
TIPPING.

The cause now came on for hearing.

Mr. *Roupell* and Mr. *Bazalgette*, for the Plaintiff:

Mr. *Turner* and Mr. *Rolt*, for the Defendant, amongst other things, contended, that the deed operated as a bar; that the greatest extent of relief to which the Plaintiff could be entitled, was to surcharge and falsify the settled account, giving to the Defendant a right to add to his charges. That all the creditors to the arrangement, who were interested in the reduction of the Defendant's debt, ought to be made parties, and that service on them of copies of the bill was not sufficient.

*Todd v. Reid (a)*, and *Tickel v. Short (b)*, were cited.

Mr. *Roupell*, in reply.

The MASTER of the ROLLS reserved his judgment.

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The MASTER of the ROLLS.

April 18.

The Defendant, by his answer, discloses a mode of transacting business which I hope is not usual. He admits, that being the Plaintiff's factor, he bought some of the Plaintiff's goods himself, and accounted for them, just in the same manner as if he had sold them to others, in the regular course of business. He says, indeed, that he did this only in cases where the proceedings were beneficial to the Plaintiff. The Plaintiff, he says, was  
urgent

(a) 4 *Barn. & Ald.* 210.

(b) 2 *Ves. sen.* 238.

1846.

CLARKE  
v.  
TIPPING.

urgent for speedy sales, which, from the state of the market, could not be effected without a sacrifice; and, therefore, the Defendant frequently advised him of having made sales at fair prices, higher, as he says, than could have been obtained at the market, when in fact no sales had been made. He does not pretend that he gave any notice of this proceeding to the Plaintiff.

Again, he admits, that he did not always account for the true quantity of the Plaintiff's goods which he sold; but this also, he says, was done under circumstances beneficial to the Plaintiff. It seems, flour is an article which decreases, and oatmeal an article which increases in weight by keeping, in consequence of more or less dryness and subsequent exposure; and for this reason, upon the sale of oatmeal, the consignor may expect a weight sold by his factor exceeding the amount which he himself consigned. Under these circumstances, the Defendant speaks of allowances, which he was obliged to make to purchasers, in consequence of diminutions in the weight of flour, and of losses which he consequently sustained or was obliged to take on himself, by reason of some sacks of oatmeal containing less than the average quantity. Claims, in respect of such losses, being sometimes made, he says, that, to meet losses which arose in this way, and in anticipation that such claims would be made by customers, he, at times, reserved out of the account sales, a small quantity of flour or oatmeal. He says, that in some cases it happened, that no such claims were made by the purchasers, and in other cases, claims were made and allowed, and it is impossible now to distinguish the cases in which claims were not made, from the cases in which claims were made and allowed; and as to the increase of weight, or the overweight of meal, he says, it was sold and the Plaintiff obtained the benefit of it, and the

the account sales were returned to the Plaintiff of the whole overweight, except indeed, that a few sacks were, occasionally, deducted out of the overweight, to indemnify the Defendant from the losses sustained by him, as explained in the answer. But further, at the end of a season, it sometimes appeared, that the overweight credited to the Plaintiff exceeded the proportion credited to the other shippers, and was more than could (as the Defendant says), in all probability, have arisen from his own stock, and, in consequence thereof, the Defendant, sometimes, made a deduction of a few sacks from the overweight (*i. e.* I suppose the overweight then credited to the Plaintiff), to meet any claims of the other shippers which might be so made on the Defendant; and he says, that such claims were sometimes so made by other shippers, and allowed them by the Defendant. He further says, that there were other reasons which called for and justified the deduction of oatmeal, and, under the circumstances stated, he considered himself to be, and he states that he was, entitled to some compensation or indemnity, for the several losses he sustained and was liable to, and that he did, therefore, deduct, on returning the account sales, a few loads, the quantity of which he made commensurate, to the best of his judgment, with the amount of losses sustained by him.

1846.  
CLARKE  
v.  
TIPPING

Whether the Defendant was entitled to any compensation or indemnity, for any such losses or liabilities as he has described, is, if it be a question, a question not now under my consideration. It may, possibly, have to be discussed hereafter. But whether a factor, receiving goods from his principal for sale, has a right to abstract a part of those goods for his own advantage, for the purpose of compensation, indemnity, or otherwise, and at the same time deceive his principal by



1846.  
 CLARKE  
 v.  
 TIPPING.

rendering account sales, purporting to comprise, but not, in fact, comprising, all the goods which were placed in his hands for sale, can, I think, be no question with reasonable men. The Defendant does not pretend, that he gave, in his accounts, any indication of his proceeding. I think that his conduct was unjustifiable, and his mode of accounting wholly vicious. He does not appear to have considered truth of statement as at all necessary to be observed in his accounts.

Some of the Plaintiff's goods were sold at *Liverpool*, others at *Manchester*; whether sold at *Manchester* or not, the Defendant always went on the system of advising all sales as if effected at *Liverpool*. This he endeavours to represent as beneficial, or, at least, not prejudicial, to the Plaintiff. He charged for insurance without having insured, and represents that, as he thereby took the risk upon himself, he had a right to do so, or, in other words, that, providing no other security than his own, he had a right to charge and deal with the Plaintiff, as if he, in the discharge of his duty, had provided security in the regular way. Again, he admits that he charged the Plaintiff more than he expended for portorage, cartage, and other things of that sort; but then, he adds, that the excess was not more than sufficient to give him interest, which (though he did not charge it, or bring it to the Plaintiff's notice), he alleges, he was entitled to charge, and other petty expenses which were not noticed in his accounts. I do not think it necessary to go further into the particulars of this case, thinking that I have already stated more than sufficient to shew, that this Court cannot permit such accounts to stand. They are not true statements, not true indications even of the transactions to which they relate. They are such as are calculated to deceive the Plaintiff, to make him believe that the transactions were different from those which the Defendant

defendant knew them to be. Such accounts may have been the means of effecting great fraud. I do not say that they have been so used in this case: I have no evidence before me to enable me to come to any conclusion as to that; but I am bound to say, that the Plaintiff has, in my opinion, a right to have these accounts duly taken from the beginning. The result will shew what, if any, wrong has been done to the pecuniary interest of the Plaintiff.

1846.  
CLARKE  
v.  
TIPPING.

Upon the attempt which has been made to prove, that some of the modes of proceeding adopted by the Defendant are according to the custom of the trade, I do not think it necessary to say more, than that, in my opinion, such customs, if there be any such, cannot be legal. A man may make what agreement he will for the remuneration of his agent out of his own property: he may allow a per centage for trouble and guarantee, or for petty expenses; but no mere custom can authorise an agent in secretly deducting from his employer's goods an indefinite quantity, to indemnify himself from losses and liabilities known only to himself, or in adding the amount of some unstated expenses to the true amount of some actual expenses charged in the account, thereby falsifying the actual charge for an allowed expense. It cannot be legal to suppress the fact of certain losses and expenses having been incurred, and without the knowledge of the principal, to obtain compensation for them, by adding the amount, of which the principal has no notice, in the account sales, for portorage, cartage, and storage, and, by taking an unstated quantity from the overplus weight of oatmeal, and making a deduction from the account sales, of a sum pretended to be equivalent to such losses and expenses. The whole process is founded in illegal concealment and in falsehood.

1846.

CLARKE

v.

TIPPING.

Among the most important duties of a factor, are those which require him to give to his principal the free and unbiassed use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of other persons. The Defendant has violated all these and other duties, in the transactions to which I have adverted, and I am of opinion that no credit is due to his accounts, and that the Plaintiff is not, under the circumstances of this case, bound to abide by them.

A point was properly raised as to the constitution of this suit. It does not appear, on the present occasion, that the Plaintiff is himself entitled to the benefit, or to the whole benefit, which may be derived from taking the accounts now prayed. The Plaintiff takes upon himself the responsibilities of the suit, and which may arise in the prosecution of the accounts; but the benefit, if any, may belong, wholly or in part, to the creditors who were entitled to the benefit of the arrangement made in the year 1841; and these creditors are not parties in the ordinary sense, but, having been served with copies of the bill, and having entered no appearance, are bound by all the proceedings in the cause (a); and it appears to me, that the Defendant is protected as against them, and not liable to be sued by them for the same matter. I think, therefore, that the Defendant is not entitled to object to the constitution of the suit for want of parties; and, for the purpose of preventing any injury to the creditors themselves, I shall insert a clause in the decree, to the effect that it is made without prejudice to any interest which the creditors may have, in any sum of money which the Plaintiff may recover from the Defendant on taking the accounts.

An

(a) See the 23d and 25th General Orders of August 1841, *Ordines Can.* 171, 172.

An account must, therefore, be taken of the dealings and transactions between these parties, and, in taking the accounts, the Defendant must have all just allowances.

1846.  
CLARK  
v.  
TIPPING.

GIBSON v. HEWETT.

Jan. 12.

THIS bill was filed by *Gibson* (a mortgagee under *Brown*) against *Hewett* and *Ingledeu*, who were also mortgagees under *Brown*, and against *Brown*, and the object of the bill was to ascertain what was due to *Hewett* and *Ingledeu*, and for redemption and foreclosure. It was stated, that of the Defendant's mortgages, some were anterior and others subsequent to that of the Plaintiff.

A mortgagee, against whom a bill was filed by another mortgagee for redemption and foreclosure, admitted the possession of vouchers consisting of bills of exchange and promissory notes. Held, that he was bound to produce them.

*Hewett*, by his answer, admitted the possession of documents relating to the matter; but he "insisted, that he was not bound to produce or permit an inspection of the documents set forth in the second part of the schedule, inasmuch as they constituted his title deeds, evidence and vouchers."

In the second part of the schedule were specified a number of mortgages, and a considerable number of bills of exchange and promissory notes of *Brown*.

Mr. *Turner* and Mr. *J. Anderson* moved for the production of all the documents, except the mortgage deeds and the drafts of the mortgage deeds, the production of which they did not insist on.

Mr. *Willcock*, *contra*, resisted the production of the bills of exchange and promissory notes. He argued that

1846.

GIBSON  
v.  
HEWETT.

the Defendant was not bound to produce his title deeds and evidences, for it was a settled rule, that a mortgagee was not bound to produce his securities, so as to enable an adverse party to pick holes in his title: that bills of exchange and promissory notes came within the protection, as it might happen, that, on their production, some of them might be found to want proper stamps. Secondly, that they were the Defendant's evidence, and from their nature could not assist the case of the Plaintiff.

*The MASTER of the ROLLS* said he had not heard any thing which precluded the Plaintiff from having an inspection of the bills of exchange and promissory notes, and he ordered their production accordingly.

1845.  
Dec. 13. 20.  
1846.  
Jan. 12.

## WILES v. COOPER.

A husband contracted for a lease of some premises, and he afterwards induced the trustees of his marriage settlement, who

**T**HIS was a motion for a receiver. The bill was filed by Mr. *Wiles* against his wife and the trustees of the marriage settlement; and the substance of the case was as follows: —

In

held monies for the separate use of his wife, without power of anticipation, to act in breach of their trust, and to purchase the property. The property was conveyed to the trustees, and, by a deed executed by the husband and wife, it was declared that it should be held for their indemnity and on the trusts of the settlement. The husband laid out very considerable sums of money in building and repairs, and, with the consent of the wife, was permitted to receive the rents. After some years, disputes arose; the trustees insisted on receiving the rents, and proceeded at law to enforce their rights; whereupon the husband filed a bill against the trustees and his wife, claiming a lease under the agreement, and asking for a sale of the property, and for the application of the produce, first in replacement of the trust funds, and afterwards in reimbursing the Plaintiff his outlay. A motion for a receiver was refused with costs.

In 1833, the Plaintiff married the Defendant *Dorothy Wile*, and on that occasion a settlement was executed, by which certain monies were vested in trustees, in trust to lay out in government or real securities, to be held in trust for the separate use of the wife for life without power of anticipation, with remainder to the husband for life, with remainder to the issue.

1846.

WILES  
v.  
COOPER.

The Plaintiff soon afterwards entered into a contract with the owner of some houses in *York Row*, for the renewal of the leases thereof, which were within two years of expiring, and he laid out a very considerable sum of money in the repairs, amounting, as he stated, to 1200*l*.

He afterwards persuaded the trustees of the marriage settlement (in breach of their trust) to invest part of the trust money in the absolute purchase of the property, which was copyhold. They did so, and were admitted tenants.

The Plaintiff afterwards laid out, as he said, 3000*l*. and upwards in rebuilding and repairing the property.

By indenture, dated in *December* 1837, and made between the Plaintiff and wife of the one part, and the trustees of the settlement of the other part, after reciting the purchase, it was declared, that the trustees should stand possessed of the property, upon the trusts of the settlement; and it was provided that the trustees should have power to sell the property, and out of the rents and purchase-money to indemnify themselves against all damages, &c., sustained by reason of the trust monies having been so disposed of, and subject thereto, to hold the residue on the trusts of the settlement. The Plaintiff also thereby covenanted to indemnify them.

1846.

WILES  
v.  
COOPER.

The trustees, with the consent of the wife, permitted the Plaintiff to receive the rents of the property to 1845, when, in consequence of some disagreement arising from his refusing to sign the accounts, the trustees insisted on receiving the rents by their own hands. They accordingly gave notice to the tenants to pay rents to them, and they proceeded to enforce payment by means of an action at law.

The Plaintiff, insisting that the trustees took the property subject to his right to a lease, filed this bill for the specific performance of the contract, and he prayed, that the property might be sold, and, after satisfaction of the trust money, the surplus might be applied in reimbursing the Plaintiff the monies laid out by him on the property.

A motion was now made on behalf of the Plaintiff for a receiver.

Mr. *Shebbeare*, in support of the motion, argued, that the trustees, having notice of the agreement for a lease, were bound, as purchasers with notice, to see that the Plaintiff was satisfied, and, especially as they had stood by and permitted the Plaintiff to make a considerable outlay in rebuilding and repairing the premises, without any objection. He said that the interests of the trusts required the realization of the money, and that the Plaintiff's wife, who objected to the receipt of the rents by the solicitor of the trusts, ought not to be put to the unnecessary expense of acting as collector of the rents, as the Plaintiff was willing, with her assent, to act as receiver without a salary.

Mr. *Chandless*, for Mrs. *Wiles*, supported the application.

**Mr. Kindersley** and **Mr. Miller**, *contra*, for two of the trustees, resisted the application, on the ground that they had duties, in reference to a married woman, which they were desirous of performing, and because they had rights of their own arising out of the deed of indemnity. They relied also on acts of the Plaintiff stated in the affidavits, which, they argued, were inconsistent with his right to a lease.

1846.

WILES  
v.  
COOPER.

**Mr. Glasse**, for the third trustee, who lived in the country, said he was willing to perform his duties of trustee, and submitted that, the property being settled to the wife's separate use, the husband was, of all persons, the most improper to administer it.

**Mr. Shebbeare**, in reply, argued that the deed of indemnity was invalid as respected the interest of the wife and children.

*The MASTER of the ROLLS.*

The estate, in this case, appears to be vested in trustees, in trust for the separate use of the wife, subject to a trust for the indemnity of the trustees against acts, admitted not to be in conformity with the trust vested in them. The singularity of the case is this: that it is an application by the husband alone, to impeach the right not only of the trustees, but also of his wife, who is entitled to the property for her separate use, without power of anticipation.

The trustees, whose duty it is to receive the rents for the wife, have permitted the husband, with her consent, to receive the rents; and this has gone on some time. Something seems to have occurred to interrupt the harmony subsisting between the parties, and to induce the trustees to say, "we must now exercise our



1846.

WILES

v.  
COOPER.

our rights and perform our duties; we have a duty to see the rents paid to the wife's separate use, and we have also a right to indemnity against the acts we have done." Thereupon the husband comes forward, insisting on a preferable right to his wife, namely, a right to have a lease, and he files a bill to establish that right, and asks for a receiver. I never knew a more singular application. I requested to hear what the wife had to say; but, notwithstanding what I have heard (as it is said) on her behalf, I am clearly of opinion, that I cannot grant this motion.

This is a case in which the wife, for any thing I know, may have some ground of claim against the trustees, and for saying that she has a right to receive payment herself for her separate use; and she may have grounds for impeaching the indemnity executed by her. I say nothing of this; it is not before me. She is not a Plaintiff, but a Defendant to the cause, and the Plaintiff can only have the relief he asks, on the ground that he has a right, both as against his wife and against her trustees. On the other hand, the trustees may claim more than they are entitled to; but I have nothing to do with that matter now. The question is, whether, on this occasion, the husband, coming adversely to the interests of his wife, to whom a separate use is limited, has a right to the relief now asked. I am of opinion he has not; and I must refuse this motion with costs.

Trustees appeared separately. One lived in a distant part of the country. The Court declined making any special order as to costs.

Mr. *Shebbeare*. The trustees have appeared separately: they ought only to have one set of costs.

Mr. *Kindersley*. One of the parties was living in a distant part of the country, and being served with a *sub-pœna*, he naturally applied to the nearest solicitor.

*The*

The MASTER of the ROLLS. I can make no special order as to the costs. (a)

1846.

WILES

v.

COOPER.

(a) See *Gaunt v. Taylor*, 2 *brook*, 4 *Beavan*, 212.; and *Garcy Bevan*, 346.; *Aldridge v. West- v. Whittingham*, 5 *Beavan*, p. 270.

1845.

In re WALTERS.

June 26.

July 31.

THE petitioner, Mr. *Walters*, was engaged as the solicitor of the corporation of *Swansea*, in obtaining an act for paving and lighting the town; and also in a suit in chancery. He employed Messrs. *Gregory & Co.* as his agents in soliciting the bill in parliament.

A solicitor having knowingly, in his bill of costs, fixed the rate of his charges for business, cannot afterwards, on a taxation, be allowed to increase it.

On the 2nd and 21st of *October* 1844, the petitioner delivered his bills of costs, amounting to 2289*l.*, which included a gross sum of 1238*l.* charged "for parliamentary agents' bill," being the bill of Messrs. *Gregory & Co.*, which was kept separate.

Pending a taxation, leave given, upon special application, to carry in an additional bill for specified items of undercharge and omission arising from error and mistake.

On the 2nd of *November* 1844, on the application of the corporation, the common order for taxation of the bill was made. The taxation of the bill was proceeded in, and about one 6th was taken off; but before the Master had made his report, Mr. *Walters* presented his petition, stating, that "in the said bills, the petitioner, on the part of himself and of his agents Messrs. *Gregory & Co.*, had wholly omitted to charge for certain matters and business, and had undercharged certain other matters and things done in the promotion of the said act of parliament; and that the petitioner had also omitted to include certain payments, made by him in the course of the

1845.

*In re*  
WALTERS.

the business in respect of which the said bills of cost were incurred, as after particularly stated."

The petitioner then proceeded to specify the particular items, and to shew, principally, from the scale of charges of parliamentary agents as laid down by the clerk of parliament pursuant to the 7 & 8 G. 4. c. 64., that the business had been considerably undercharged; and it also specified the items of alleged omission. The petition prayed, that the Taxing Master might be at liberty to amend and alter the bills of costs in the particulars aforesaid, by additions or increase thereto.

With regard to the parliamentary charges, it should be stated, that, under the 7 & 8 G. 4. c. 64., the clerk of parliament was directed "to prepare a list of all charges which should appear to him to be justly due and payable to parliamentary agents, for their skill, time, and labour bestowed by them in the prosecution of or opposition to such private bills in the House of Lords as aforesaid; and such list of charges should, if approved by the House of Lords, be binding and conclusive on all parties concerned therein." A table of parliamentary agents' charges was accordingly prepared, which, after settling the specified amounts to be allowed for particular business, contained the following notification:—"This table applies to such fees as are payable to parliamentary agents, for services performed by them in that capacity. In cases in which the same individual acts as solicitor as well as parliamentary agent, and thereby renders the employment of another solicitor unnecessary, he may be entitled to charge reasonable fees to his employer as a solicitor; but the act 7 & 8 G. 4. c. 64. applies only to charges to be allowed to parliamentary agents as such."

The

The petition, the allegations of which were supported by affidavit, now came on for hearing.

1845.  
In re  
WALTERS.

Mr. *Turner* and Mr. *Selwyn*, in support of the petition, commented on the items, and contended, that the affidavits proved clearly specific instances of omission and undercharge, and that the act declared the scale of fees to "be binding and conclusive on all parties concerned therein;" and that, upon the familiar doctrine of this Court, in relieving against accident and mistake, the Plaintiff was entitled to an opportunity of making out his claim to that which he was, in strictness, entitled upon taxation.

Mr. *Kindersley* and Mr. *Faber*, *contra*, did not dispute that the Court had jurisdiction to interfere and give relief, where, by error and mistake, omissions had occurred in a bill of costs carried in to be taxed; but they argued that such did not appear to be the case in the present instance. That the parliamentary scale of charges affected only the fees of parliamentary agents, and that where a solicitor employed a parliamentary agent, he was not entitled to charge according to the parliamentary scale for business done by him, and which must be attributed to his character of solicitor; and that, at all events, any permission given to vary the petitioner's demand should be limited to the bill of Messrs. *Gregory & Co.*, the parliamentary agents.

They cited *Loveridge v. Botham* (a), in which an attorney had, in 1793, delivered his bill, and afterwards, in 1795, delivered another bill for business done during the same period,

(a) 1 *Bos. & Pul.* 49., and see 237., and 1 *Phil. on Ev.* 390. *Anderson v. May*, 2 *Bos. & Pul.* (8th ed.)

1845.

*In re*  
WALTERS.

Liberty given,  
pending tax-  
ation, to de-  
liver an addi-  
tional bill of  
costs.

period, containing new items and increased c  
“ the Court said, that the delivery of the  
was conclusive evidence against an increas  
on any of the items contained in it, and stron  
tive evidence against any additional items;  
errors or real omissions in the former bi  
proved, they ought to be allowed for: and  
directed the prothonotary to review on this  
tinction.” They also referred to *Deaves's MSS*

(a) The following is the pas-  
sage in *Deaves's MSS.* relating  
to the subject:—“ Applications  
have sometimes been made for  
liberty to alter or amend a bill  
after delivery, or to deliver a  
new bill, as in *Farnham v Herle*,  
10th Feb. 1742; but, I apprehend,  
the Court never does anything  
of this nature without hearing  
the parties, unless for some  
special reason. But I have known  
the executor of a solicitor obtain  
leave to deliver an additional  
bill after a reference, for business  
not included in a former bill, as  
was the case in *Morrish v. Cole*,  
11th June, 1742.”

“ *Foster v. Rayner*, 28th Oct.  
1745. Petition of *Jane Denham*,  
widow and administratrix of  
*George Denham*, deceased, the  
Plaintiff's late solicitor. The  
petitioner's intestate had deli-  
vered the Plaintiff a bill of fees  
in his lifetime, and since his  
death, petitioner had brought an  
action to recover what was due,  
thereupon the Plaintiff applied  
and obtained the common order  
for taxing the bill; but the in-  
testate having made several omis-  
sions and undercharges in the

bill, the petition  
liberty to alter ar  
said bill of fees  
ments, or to alt  
items already ch  
by enlarging or  
same, but she is  
or make less any

“ *Field v. Player*,  
*Agnes Maundrell*,  
executrix of *T.*  
Defendant's late  
delivered a bill  
for business don  
to *Michaelmas*,  
referred to be t  
since discovere  
*London*, that  
done busines  
since that tim  
that she mig  
leave with t  
additional bi  
proper, and t  
tax the sam  
fendant m  
Master shc  
to her on  
Be it so, c

After  
matter  
present;  
ceeds as

*The MASTER of the ROLLS*, in the course of the discussion, intimated his opinion, that a solicitor having once knowingly fixed the rate of his charges for business, could not afterwards, upon an adverse taxation, be allowed to increase it without special leave. He was also of opinion that any relief now to be granted in respect of the parliamentary charges must be confined to the parliamentary agents' bill.

1845.  
In re  
WAITERS.

At the end of the discussion, his Lordship said he thought that the petitioner ought not to be finally excluded, and allowed the case to stand over, to give him an opportunity of satisfying the Court, by affidavit, that the alleged undercharges and omissions in the agent's bill had been occasioned by error or mistake.

*The MASTER of the ROLLS*, being satisfied with the additional evidence, gave liberty to the petitioner to carry in an additional bill of costs of the specified items, but ordered him to pay the costs of the petition. (a)

July 31.

der "Let the petitioner be at liberty  
ty. to bring before the Master an ad-  
ditional bill of any items of busi-  
ness done or money paid, omitted  
to be charged in his said bill  
already delivered, and likewise  
to alter any of the items already  
charged in his said bill, by in-  
creasing or enlarging the same ;

but he is not to diminish or  
make less any of the items al-  
ready charged. And let the  
Master tax such additional bill  
and enlarged items. And here-  
of, &c."

(a) See *In re Wells*, 8 Beavan,  
416., and *In re Carver*, 8 Beavan,  
p. 438.

1846.

Jan. 28.

## HODGKINSON v. COOPER.

Upon the sale of a leasehold for lives, expressed to have been granted by a corporation in consideration of the surrender of a prior lease, the title to the surrendered lease must be shewn.

BY indenture, dated the 17th of *July* 1815, made between *St. John's Hospital, Bath* (an eleemosynary corporation), of the one part, and *Henry Knight* of the other part, and which contained no recitals, it was witnessed, in consideration of a good and perfect surrender made to the said hospital of the premises thereafter demised, and of the term or estate which was granted therein by the same Hospital to *Jane Milsum* and *William Cottell*, by indenture of lease under the common seal, bearing date the 8th day of *August* 1769, for the lives of three parties in the said indenture named, and the life of the longer liver of them (one of whom was since dead), and to which surrendered estate and premises the said *Henry Knight* was stated to be, by good and sufficient conveyances and assurances in the law, legally entitled, for the remainder of the estate and interest thereby granted, and also for the other considerations therein stated, the said corporation demised to the said *Henry Knight*, his heirs and assigns, a house and premises situated in *Bath*, to hold the same for the lives of the three several persons therein named, and the life of the longest liver of them, at the rent and subject to the covenants therein mentioned.

This leasehold interest having become vested in the Plaintiffs, they, in 1839, agreed to sell it to the Defendants, by the description of all that dwelling house, &c., situate &c., held of the hospital for three lives, of 34, and 32, or thereabouts, at a rent of £; and it

was

was stipulated that the Plaintiffs were not to be called on to shew the landlord's title.

1846.  
  
 HODGKINSON  
 v.  
 COOPER.

A bill having been filed for specific performance, it was referred to the Master to inquire whether a good title could be made.

Before the Master, it was objected by the purchasers, first, that the Plaintiffs ought to produce and shew a good title in *Henry Knight* (the lessee mentioned in the lease of the 17th of *July* 1815), to the leasehold interest created by the lease of the 8th day of *August* 1769, the surrender of which was the consideration of the lease of 1815; and, 2dly, that the Defendants were entitled to evidence of a title for sixty years last past to the leasehold premises, the last lease being a renewed lease, under the corporation therein mentioned, in consideration of a former subsisting lease.

The Master allowed the objections and reported against the title.

The Plaintiffs took exceptions to the report, which now came on for argument.

Mr. *Kindersley* and Mr. *Adams*, for the Plaintiffs, in support of the exceptions. By the agreement, the Plaintiffs contracted to sell to the Defendants certain property, held under a specific lease from certain parties mentioned in the agreement, they are not, therefore, bound to shew any title to the property, except to the very lease agreed to be sold.

It is the constant practice of eleemosynary corporations to put in new lives, from time to time, and to grant a new lease, upon having a surrender of the old



1846.

HODGKINSON  
v.  
COOPER.

one. If the reference in the lease of 1815 to the lease of 1769 makes it necessary to go back to the lease of 1769, then, in all probability, the lease of 1769 will be found to refer to some prior lease, which, upon the same principle, the Plaintiffs must shew a title to, and in the end, a vendor might be obliged, by such a rule, to carry back his title for centuries. The difficulties would become insuperable, and, on the ground of convenience, such a doctrine ought to be rejected.

There has been thirty years undisturbed possession under the lease of 1815, and a good title may be presumed from long possession (*a*), especially since the new statute of 3 & 4 W. 4. c. 27., which removes the necessity of carrying back the title for so long a period as was formerly customary.

Mr. *Turner*, Mr. *Wood*, and Mr. *Malins* for the Defendants. The statement in the lease of 1815, of the existence of the lease of 1769, gives notice to the purchaser of its contents and all equities attached to it. It, therefore, becomes the root of the title, and the equitable right to it must, therefore, be shewn.

This may give rise to great difficulties, but it is the settled law. "When a lessee" of a renewable lease, "sells, he produces an abstract of the subsisting lease and subsequent instruments. This, (says Sir *Edward Sugden*,) is a title which it is impossible to accept, however willing the purchaser may be, and although he may have waived calling for the lessor's title. Every lease is stated to be granted in consideration of the surrender of the former lease, and by means of this reference,

(*a*) *Fildes v. Hooker*, 2 Mer. 424.; *White v. Foljambe*, 11 Vet. 337

reference, the chain of title is kept up. The reference in the last lease to the one immediately preceding, is notice of it to the purchaser; and that again is notice of the one before that, and so by steps to the first lease. And if, in any of these leases, the lessee is described as devisee under a will, or there is anything to lead the mind to a conclusion that the lessee is not absolutely entitled, the purchaser will be liable to the same equity as the lessee was subject to, although he had no other knowledge of the fact, than the mention in the lease of the surrender of the former lease, equity deeming that sufficient to lead him to inquire into the title. Harsh as this rule may seem, it is quite consistent with the general principles of equity, and is called for in this case, because public bodies generally renew with the person having the legal estate, and seldom suffer any trusts to appear on the lease, lest they should be implicated in the execution of them." (a)

1846.  
HODGKINSON  
v.  
COOPER.

In *Coppin v. Fernyhough* (b) a tenant for life of a Prebendal lease for twenty-one years, usually renewable every seven years, had taken a renewal in his own name, which recited, among other considerations, the surrender of the former lease. He afterwards mortgaged the premises, as his own property, to the Defendant *Brown*. Upon a bill filed by the remainderman, it was held, that *Brown* the mortgagee was affected with notice of the Plaintiff's title, and he was ordered to convey the estate accordingly.

The lease of 1815 states, that *Knight* was legally entitled, that seems to imply that he was not equitably entitled.

It

(a) 2 *Sugden on Vendors*, (b) 2 *B. C. C.* 291.  
(10th ed.) 150.; 2 *Preston on Abstracts*, 10. 230.

1846.  
  
 HODGKINSON  
 v.  
 COOPER.

It is the settled rule of conveyancers to require a sixty years' title, even of leaseholds, and the statute referred to has not in any way affected that rule.  
*Cooper v. Emery. (a)*

Mr. Kindersley, in reply. *Coppin v. Fernyhough* does not shew that a purchaser is entitled to a sixty years' title, or a title anterior to the lease he has purchased, but that the recital of one lease in the subsequent one is notice of the contents. The purchaser might be entitled to the production of the lease of 1769, but it is quite another thing to say, he is entitled to a full deduction of the title to it. The mere production of that lease has never been required.

*The MASTER of the ROLLS.*

Owners of property of this description are in a very unfortunate situation; and are exposed to difficulties in selling, which ordinary vendors are not subject to. I regret it; but I have no power or authority to remedy the inconvenience, my only duty being to apply the established rules of law to the cases, which, from time to time, come before me.

The Plaintiffs in this case filed their bill for the specific performance of an agreement, and the ordinary reference was made to the Master, to inquire if they were able to make a good title. The title which they allege is, that they are assignees of the grantees for lives of these premises, held under a corporation, and the first deed they produce is the deed of 1815, by which, in consideration of the surrender of a former lease,

(a) 1 *Phillips*, 388. ; and see *Jumpton v. Pitchers*, 13 *Simons*, 327. and 1 *Coll.* 13.

lease, the corporation granted to *Knight* and his heirs, the house in question, for certain lives.

1846.  
HODGKINSON  
v.  
COOPER.

It seems, that the Plaintiffs have regularly deduced their title from that lease, so that they may be said to have such title as *Knight* had under the grant; but it appears that the grant was made, in consideration of the surrender to the corporation of a former lease granted by them in *August* 1769.

It is said, that in deducing the title to a leasehold property of this kind, the title of the lessee to the surrendered lease is to be considered part of the title of the lessee to the renewed lease; and that, although there would have been a good title in the present Plaintiffs, if the lessors had made the grant without any mention of any former lease, yet that, when you find the lease was granted, in consideration of the surrender of the former existing lease, the title to the surrendered lease is to be taken into consideration, and you must go further back in deducing the title. It is, therefore, said, that the title of *Knight*, as surrenderor of the old lease, is part of the title now under consideration.

It has been also argued here, and I have heard nothing to the contrary, that, when you have a grant to a man and his heirs for lives, the title must be made out, in the same way as the title to the property held in fee-simple; and I am very much afraid that one of the objects of the legislature in passing the act of limitation referred to, namely, that of shortening the period of deducing titles, has not been effected, in consequence of the construction put upon that statute.

We have, therefore, to consider the title of *Knight* to the lease surrendered, which connects the previous title with the subsequent lease of 1815; and all we have

1846.  
  
 HODGKINSON  
 v.  
 COOPER.

is this :—the fact that he was considered by the lessors entitled to a legal right to the surrendered lease, and to the possession. There is nothing more, and this is not enough. It appears from the lease of 1815, that there was a former lease, and between the grant of the first and second leases there was a period of about forty-six years, and nothing is stated of what was done during that period.

It may be possible, that the vendors might be obliged to go to a very great and unreasonable extent if the same rule be followed up, and it may happen, that leases prior to the lease in question may be so connected with leases preceding them, that it may be found impracticable to make out the title ; but that by no means necessarily follows, for when you go to a certain extent back, the Court necessarily resorts to favourable presumptions, arising from the facts brought before it.

My opinion is, that the Plaintiffs are bound to make out some title in *Knight*, the surrenderor of the former lease ; and, that it would not be consistent with my duty to disturb the Master's report, finding that a good title has not been made out. The exceptions must be overruled.

If the vendors think they can remove the difficulty, I should be inclined to attend to a proper application to enable them to complete their title.

Mr. *Kindersley*. All we have at present is, the lease of 1769.

*The MASTER of the ROLLS.*

I do not think that sufficient ; you may present a petition (*a*), if you find that you are able to deduce the title to the surrendered lease.

(*a*) As in *Sidebotham v. Barrington*, 4 *Beavan* 110, and 5 *Beavan*, p. 262.

1846.

RIGBY v. RIGBY.

Feb. 26.

**T**HIS was a motion, on behalf of the Plaintiff, that certain Defendants might file their answer within eight days, or in default, that the Plaintiff might be at liberty to file a traversing note.

The 16th General Order of May 1845, Art. 38. has reference to amendments after answer. When the amendments are before answer, the case is governed by the 14th article of the same Order.

The bill had been filed in *July* 1845, and an appearance entered in the same month. The Defendants in question, being resident abroad, obtained, in *November* 1846, a commission to take their answer. The commission had been executed, but the Plaintiff having refused to take the answers without the oath of the messenger, the Defendants were awaiting the opportunity of sending it over, without the expense of a special messenger for the purpose.

Where a bill was amended before answer, an answer expressed to be "to the bill of complaint &c." is regular, but where the amendments take place after answer, the subsequent answers should be headed, "to the amended bill of complaint."

The Plaintiff, in *January* and *February* 1846, complained of the delay, and threatened to apply to the Court. On the 4th of *February*, the Plaintiff obtained an order to amend his bill, which he amended accordingly, and on the 18th, gave notice of the amendments to the Defendants. The bill required an answer to the whole bill, but the Plaintiff gave notice to these Defendants, that he did not require from them an answer to the amendments. The Plaintiff now moved, that the Defendants might file their answer within eight days, or in default, that he might be at liberty to file a traversing note.

Mr. Cairns, in support of the motion, urged the delay which had occurred in filing the answers. He insisted,

X 4

that

1846.

RIGBY  
v.  
RIGBY.

that the Defendants were now in default in not answering as no answer was required to the amendments; and that if it were otherwise, then, under the 16th Order of May 1845, art. 38. (a), the Defendant had only eight days to answer the amendments.

Mr. Kindersley, Mr. Turner, and Mr. Hallett, *contra* contended that the Defendants were not in default; that the Plaintiff had, by his amended bill, required an answer to all the interrogatories, and that the notice given by him to the Defendants, did not alter the case, or deprive the Defendants of their right to answer the amendments, if they pleased.

That the General Order referred to, was applicable only to the case of amendments after answer, otherwise by amending immediately after appearance, the six weeks time to answer an original bill, to which a Defendant was entitled, might be cut down to eight days. That the Defendant's answer, as sworn, being entitled an answer to the original and not to an "amended bill" would not be received by the Clerks of Records and Writs, and that this difficulty had been created by the Plaintiff himself, who ought not to be permitted to take advantage of it.

Mr. Cairns in reply.

*The MASTER of the ROLLS.*

No doubt the Plaintiff is entitled to the oath of the messenger; but the question is, if a motion like this can be granted under such circumstances. Since the answer was taken, the Plaintiff has altered the record. The case is not like one where, after answer, the bill is amended

(a) *Ord. Can.* 289.

amended with proper precaution, so as to prevent the Defendant being subject to any process for not answering, and leaving him the option of putting in an answer if he pleases. Here, the bill was amended in such a manner as to put the Defendants under an obligation to answer the record as it stands, although notice was served, that they were not required to answer that portion of the bill introduced by amendment. This notice does not alter the obligation of the Defendants. They are now in this position; they have actually prepared and sworn answers which are ready to be brought over and filed when a proper opportunity occurs. It appears that it is an answer, not to the record as it now stands, but to the record before the amendments, and it is asked, that he may file that answer in a given time, or, in default, that the Plaintiff may be at liberty to file a traversing note. If this answer were tendered at the Record and Writ Clerk's Office it might be a question whether it would be received, because it is no answer to the record as it stands. If not, it would be very harsh to permit the Plaintiff to file a traversing note, where the answer of the Defendant cannot now be received, in consequence of subsequent amendment of the bill. I will not dispose of the case, until I know what is the practice in the office as to the form of the answer; but I think there are other grounds for refusing the motion. The Plaintiff may think the amendments merely formal, yet the Defendant may take a very different view of the matter, and require an opportunity to answer them.

1846.  
RIGBY  
v.  
RIGBY.

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Mr. Veal, the Record and Writ Clerk, being referred to, stated, that when a bill was amended before answer, an answer expressed to be "to the bill of complaint, &c.," was considered regular, and would be filed; but that



1846.

RIGBY

v.

RIGBY.

that where the amendments took place after answer, the subsequent answer must be headed "to the amended bill of complaint." (a)

The MASTER of the ROLLS afterwards stated the result of his communication, and said, that this did not determine the question before him, and that he was of opinion, under the circumstances, that the Defendants had six weeks to answer the amended bill under the 16th General Order of May 1845, art. 14. (b)

(a) See *Smith v. Byron*, 3 (b) *Ord. Can.* 281.  
*Mad.* 428.

Murch 7. 9.

MUGGERIDGE v. SLOMAN.

A reference of exceptions made *instantly* in an injunction case, and upon an *ex parte* motion. It is not an order of course, but a special case of prejudice must be made out by affidavit.

THE bill in this case prayed, amongst other things, an injunction to restrain an action at law, commenced by the Defendant on the 30th of January. The Defendant filed his answer on the 23d of February, and on the 3d of March, gave notice of trial for the 23d of March. On the 5th of March, the Plaintiff filed exceptions to the answer.

By the 16th Order of May 1845, Art. 25 (a), Plaintiff is not to refer exceptions for insufficiency before the expiration of eight days, except in cases of election.

Mr. Rolt now moved, *ex parte*, that the exceptions might be referred *instantly*, on the ground, that the exceptions were pending.

(a) *Ordines Can.* 284.

pendency of the exceptions prevented the Plaintiff obtaining the common injunction, and that thereby the Defendant might, notwithstanding his answer was insufficient, proceed to trial, and enforce his legal right contrary to equity. In the present case, he said, the Defendant was a mere trustee or holder for other parties of the promissory note on which he was suing.

1846.  
MUGGERIDGE  
v.  
SLOMAN.

The MASTER of the ROLLS said, that he had no doubt as to the jurisdiction of the Court to make the order. That by the new Orders, a Plaintiff was not to refer exceptions before the expiration of eight days, and that the only exception was that of election cases; but in the case where exceptions were shewn as cause against dissolving an injunction, the Court would make the reference *mero motu*, or on the application of the other side. (a)

That, here, the Plaintiff desired a special order of reference, notwithstanding the General Order, the effects of which would be to deprive the Defendant of the opportunity of submitting to the exceptions. However, he thought the Plaintiff entitled to it, on making out a special case, by affidavit, shewing that the Plaintiff would be seriously prejudiced by the delay in disposing of the exceptions.

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Mr. Rolt renewed his motion, which was supported Mar. 9. by affidavit.

The MASTER of the ROLLS.

It is right that such an order as that asked should be made in a proper case. I am aware that it has been thought

(a) See *Hughes v. Thomas*, 7 Beavan, 584.

1846.  
 MUGGERIDGE  
 v.  
 SLOMAN.

thought a matter of course elsewhere, but that is not my opinion. The party ought to shew that he would be seriously prejudiced by the delay, and state that he is advised that he has good ground for equitable relief, and that he makes the application *bonâ fide*, and not for delay. It will be well to consider the proper form of affidavit to be made on such occasion. I by no means say that the affidavit in the present case is in the best form; but you may take the order.

March 11.

REECE v. TRYE.

Cases and the opinions of counsel thereon, anterior to the litigation, held privileged from production.

THIS was a motion for the production of documents. The circumstances of the case, as stated by counsel, were as follows:—

In 1819, an estate was conveyed to trustees for Mrs. Lester for life, with remainder to Mr. Lester her husband, for life, with an ultimate limitation to Mrs. Lester in fee. On the death of the husband, the ultimate limitation took effect. The Plaintiff claimed the estate as heir of the wife, and brought an action of ejectment, which was defended by the Defendant, the trustee of the settlement, by proving a feoffment and fine made and levied by him, and he thus obtained a verdict.

This bill was afterwards filed to set aside the feoffment and fine, on the ground of fraud, and insisting that the Defendant could not avail himself thereof, he standing in a fiduciary character, being named in the settlement as releasee to uses, and trustee to preserve contingent remainders,

remainders, and having vested in him powers of leasing and of sale and exchange.

1846.

REECH

v.

TRYE.

The Defendant, by his answer, made the following statement as to his possession of documents : —

“That he hath, in the second part of the said first schedule, set forth a true list or schedule of certain papers and writings now in the possession or power of this Defendant, relating to the said *Foxcoate* estate, or some part thereof; but this Defendant saith, that such papers consist of a case laid before counsel, by or on the part of this Defendant, after the death of the said *Thomas Young Lester*, for his opinion and advice on the title of this Defendant to the said estate, and counsel’s opinion thereon, and of the papers and proceedings in the said ejectments, and of communications between this Defendant and his solicitors, and instructions for counsel, with reference to this Defendant’s defence to the said ejectments. And this Defendant submits, that such papers and writings are privileged documents, and that this Defendant is not bound to produce the same.”

The second part of the first Schedule was as follows : —

“Case laid before Mr. *Bellenden Ker*, as counsel on the part of the Defendant, with Mr. *Bellenden Ker*’s opinion thereon.

Instructions to Mr. *Bellenden Ker* to peruse and settle the draft of the said indenture of feoffment of the 17th day of *January* 1830.

The draft of the said indenture of feoffment of the 17th day of *January* 1819, with Mr. *Ker*’s opinion thereon.

1846.

REECE

v.

TRYE.

Case laid before Mr. *Duval*, as counsel on the part of the Defendant, with Mr. *Duval's* opinion thereon.

Briefs laid before Mr. *Whateley*, Q. C., ♦ Mr. *Whitmore*, and Mr. *J. W. Smith*, respectively, on the trial of the ejectments mentioned in the foregoing answer, with memoranda of counsel thereon.

Copies of the interrogatories contained in the Plaintiff's bill of complaint, with replies and private memoranda written thereon.

Case laid before Mr. *Chapman Barber*, as counsel for the Defendant, with Mr. *C. Barber's* opinion thereon.

Instructions to Mr. *C. Barber* to prepare draft answer, with letter from Defendant thereunto annexed.

Letter from, and many letters to, Messrs. *Whitcombe Helps*, and *Wemyss*, the Defendant's solicitors."

Mr. *Bird*, in support of the motion, did not ask for the communications between the Defendant and his solicitors and counsel relating to the ejectment or the present suit, but he contended that the protection on extended to communications which took place pending or in contemplation of a litigation.

*Holmes v. Baddeley* (a) was referred to.

The MASTER of the ROLLS (without hearing the other side) said: In deference to the highest authority, I must refuse so much of the motion as relates to the documents alleged to be privileged; I have anxiously examined the subject, and arrived at a conclusion, which to me has seemed

(a) 6 *Beav.* 521., and 1 *Phillips*, 476.

seemed right; but it has not been approved, and I have no doubt, that, if I were to order the production of these documents, the order would be reversed elsewhere.

1846.

KESCE  
v.  
TRYE.

The unrestricted communication between parties and their professional advisers, has been considered to be of such importance as to make it adviseable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained.

CHALIE v. GWYNNE.

Feb. 26.

NO proceedings had been taken in this cause for more than seven years, and then a notice of motion was served upon (amongst others) the solicitor of *David Jones*, a party to the suit.

After considerable delay in the prosecution of a suit, the solicitor of a deceased party was served with a notice of motion. Held, that his duty to the Court rendered it proper for him to appear on the motion.

Mr. *Chandless* appeared, by the instructions of the solicitor of *David Jones*, and stated, that that party had been dead some time.

A question arose as to the costs of this appearance.

Mr. *Kindersley* argued, that no body was authorised in appearing for a dead man.

The MASTER of the ROLLS.

A gentleman is appointed solicitor to a party in the cause, and that party dies. He afterwards receives notice of a motion, as if his client were living, and he knows, that an affidavit of service on him might be produced, and an order made.

I think

1846.  
 CHALIE  
 v.  
 GWYNNE.

I think the solicitor was perfectly right in appearing. He had a duty to the parties to inform them of what had happened; and he owed a duty to the Court to set the matter right, and see that no order was made upon an affidavit of service on the solicitor of a dead man.

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The matter stood over to make some inquiries.

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March 12.

Marquis of BUTE v. HARMAN.

Bequest to A. for life, with remainder to her children who should attain twenty-five, with a clause for maintenance during minority, and for accumulation of surplus income. Held, that the gift to the children was not void for remoteness.

Upon the marriage of a ward, the intended husband proposed to settle the

whole of her fortune. The Master, in ascertaining her fortune, omitted to state a reversionary interest. Her property was settled, omitting the reversionary interest, and the husband covenanted to settle any property to which the wife or he, in her right, "should at any time during the marriage" become entitled. Held, that the reversionary interest ought to be settled.

THE testator bequeathed to trustees 50,000*l.*, in trust for Lady Pole for life, and after her decease, upon trust to assign, transfer, and make over, the same securities, unto or equally amongst such child or children of her his said niece, Dame Henrietta Pole, as should attain the age of twenty-five years, or being a daughter or daughters, should marry under that age with the consent of their parents or of the survivor, or of their respective guardian or guardians; the right or share of such child or children, respectively, to be a vested interest, and transmissible to his, her, or their personal representatives, notwithstanding his, her, or their subsequent death in the lifetime of his said niece, Dame Henrietta Pole. And he thereby gave his said trustees, respectively, full power and authority, during the

the minority of the said children, or until the marriage of the daughters, respectively, with such consent as aforesaid, to pay, apply, and dispose of all or any part of the income of his, her, or their expectant share or shares, of and in the said securities, in, for, or towards his, her, or their respective maintenance and education. And as to any surplus of any such respective income, to invest the same, from time to time, in like securities, together with the interest of the accumulations; and to stand possessed of all such accumulated securities, in trust for the person or persons who should be ultimately entitled to the principal from whence the respective accumulations should arise. And in case there should be no son of her, his said niece, who should attain the age of twenty-five years, nor any daughter of her, his said niece, who should attain that age, or marry with such consent as aforesaid, then he directed that his said trustees should stand possessed of, and interested in the said securities, so to be purchased as last aforesaid, and all accumulations thereof, in trust for his said niece, Dame *Henrietta Pole*, and her executors, administrators, and assigns.

1846.  
  
 Marquis of  
 BUTE  
 v.  
 HARMAN.

Lady *Pole* had three children, and the first question was, whether the gift to such of the children as should attain twenty-five, was or not void for remoteness.

Mr. *Kindersley* for the Plaintiff.

Mr. *C. P. Cooper*, Mr. *Turner*, Mr. *Roupell*, Mr. *Tenant*, Mr. *Hetherington*, Mr. *Tremenheere*, and Mr. *Foster*, for other parties.

*Davies v. Fisher (a)* and *Newman v. Newman (b)* were referred to.

*The*

(a) 5 *Beavan*, 201.

(b) 10 *Simons*, 51.



1846.  
  
 Marquis of  
 Bute  
 v.  
 HARMAN.

The MASTER of the ROLLS said he could hardly doubt of the validity of the gift.

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A further question arose in this case. Lady *Elizabeth Villiers*, a ward of Court, was, amongst other property, entitled to one-fourth share of this legacy of 50,000*l.* A marriage being in contemplation, a reference was made to the Master to ascertain what was her property.

The Master reported the particulars of her property, omitting, however, all mention of her reversionary interest in this legacy.

By the proposals, the intended husband proposed that the whole of the intended wife's fortune should be settled on the following trusts &c., &c.; and also, that the settlement should contain a provision, that any property, whether real or personal, exceeding 3000*l.* sterling in value on each acquisition, which *might* be in any manner acquired by Lady *Elizabeth*, or by her and her said intended husband, in her right, at any one time during the said intended marriage should be settled.

By the settlement, dated the 11th of *July* 1842, the property specified in the Master's report was settled, and the intended husband and wife covenanted to settle, all and singular such real and personal estate whatsoever, if any, of the value or amount in each instance of 3000*l.* or upwards, to which the said Lady *Elizabeth*, or the said *Frederick William Childe Villiers*, in her right, should at any time or times, during the said intended marriage, become entitled, whether by devise, descent, bequest, succession, gift, or otherwise howsoever.

A question arose, whether, as the covenant referred to future acquisitions, the fund not specified was subject to the trusts of the settlement.

1846.  
  
 Marquis of  
 BUTE  
 v.  
 HARMAN.

*The MASTER of the ROLLS.*

This lady being a ward of Court and an infant, it was referred to the Master, to inquire of what her fortune consisted. The Master found that certain things constituted her fortune, which he specified in his report, omitting, however, the fund in question. The proposal made by her intended husband was, that the whole of her fortune should be settled; and an assignment was executed to trustees, which only comprised the specific property found by the Master's report. The settlement contains a covenant to settle all property exceeding the amount of 3000*L*. to which the wife, or the husband in her right, should become entitled. There can, I think, be no doubt that this property was intended to be settled, though by accident, it was omitted to be specified.

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1846.

March 16.

## GLENDENING v. GLENDENING.

The word "money," by itself, in a will, means money strictly and nothing else, but when used in connexion with other words, it may have a much more extended signification.

A testator bequeathed to his wife the interest of his money and the use of his goods for life; at her death he gave certain legacies and the remainder of his property to his brothers and sisters. Held, that the widow was entitled to the residue for life.

THE testator bequeathed as follows:—"I bequeath to my wife the interest of my money, and the use of my goods for her life; at her death, I wish 200*l.* to be given to the Lord's poor of *Salem Chapel Court, Wardour Street, Soho*; 100*l.* to *St. George's Hospital*; 100*l.* to the *St. Marylebone New Alms Houses*; 150*l.* to my poor relations at *Essenden*, and the remainder of my property to be equally divided between my brothers and sisters; my wardrobe to be equally divided between my brothers. 5th of September 1837, *James Glendening*."

The testator died in 1843, and the principal part of his property consisted of money in the funds. The remainder of his property consisted of about 50*l.* cash and a few chattels.

Mr. C. P. Cooper and Mr. Shebbeare for the widow—  
The testator intended to give the income of the whole of his property to his wife. The word "money" will pass stock in the funds. In *Rogers v. Thomas (a)*, the bequest was of "all which might remain of her money after her lawful debts and legacies were paid," and it was held that the residuary estate passed. So, in *Dowson v. Gaskoin (b)*, the residuary personal estate was held to pass by the words, "whatever remained of money." Again, the word "goods" is sufficient to pass the residue; *Kendall v. Kendall (c)*. Here it is evident,

(a) 2 Keen, 8.

(c) 4 Russ. 360.

(b) 2 Keen, 14.

evident, that the testator intended the widow to enjoy every thing for life ; for, until her death, there is no gift over. The state of the assets are such, that if the word " money " be confined to mere ready money, there will not be sufficient to provide for the legacies payable on the widow's death.

1846.  
GLENEDNING  
v.  
GLENEDNING.

The construction contended for by the Defendants would give the widow an income of no more than 50 shillings a year.

Mr. Kindersley and Mr. Campbell for the brother and sister. Neither the word " money " nor the word " goods " will, of itself, pass money in the funds or residue, unless there be something in the will to extend its natural meaning. *Kendall v. Kendall (a)*. Here there is a gift to the widow for life, expressly limited to the interest of the testator's money, and the use only of his goods, evidently meaning household furniture. After this, there is a distinct and immediate gift of the " remainder of his property " to his brothers and sisters. The wardrobe, which would not be a very appropriate gift to the wife, is given at once to the brothers. This aids our construction.

The state of a testator's property is never referred to in aid of the construction of a will of personalty, because the will speaks at the death of the testator ; and when a testator makes his will, it is uncertain what the state of his property may be at his decease. *Gosden v. Dotterill. (b)*

The

(a) 4 Russ. 360., and see (b) 1 Myl. & K. p. 59.  
*Wilks v. Plaskett, & Beavan*, 208.

1846.  
 GLENDENING  
 v.  
 GLENDENING.

*The MASTER of the ROLLS.* In construing wills, the Court endeavours to give such a construction to the words as will make the whole context consistent with the apparent general intention of the testator.

In this case, it appears clear that this testator intended to dispose of the whole of his property by his will. He has specified particular portions of it only, namely, his money, his goods, and his wardrobe, but he has also used the general word "property," and it seems plain he intended to dispose of the whole. He gives the interest of the money and the use of his goods to his wife for life; and at her death, he gives certain pecuniary legacies, and he gives the remainder of his property to his brothers and sisters. What is the time to which he here refers? I think, that looking at the structure of this will, it refers to the wife's death.

That the will is not quite consistent is evident. He gives the remainder of his property, and afterwards his wardrobe: so that the wardrobe was not comprised in "the remainder of his property," but it was a sort of property which the wife would not require after his death, and therefore everything except the wardrobe is given to the wife for life. That seems the most consistent interpretation of the will.

None of these cases are perfectly clear. Consistently with the ordinary mode of expression, an extended meaning may be given to the word "money." We hear persons daily talking of their *money in the funds*, meaning thereby perpetual government annuities; and the term money has acquired a popular meaning in many other like cases. I agree, that if you take the word "money" by itself, it means money in its strict sense,

sense, and nothing else; but when used in connexion with other words, it may have a much more extended signification. There is nothing new in that construction of the word, for in the old Roman law, the word "pecunia" was held to pass property of every description. (a)

1846.

GLENDENING  
v.  
GLENDENING.

I am of opinion that the widow is entitled to this property during her life.

(a) See 2 Keen. 19. note.

FARRANT v. NICHOLS.

March 21.

THE testator, by his will dated in 1798, directed the rest and residue of his estate and effects to be held in trust for his three daughters, *Mary, Elizabeth, and Fanny*, one moiety of their respective shares to be transferred to each on attaining twenty-three. And as to the other moiety, to pay the interest to his daughters during their lives; and from and after the respective deceases of his said daughters, then that his trustees, &c. should stand possessed of and interested in the said respective moieties of his said daughters, of and in the said trust monies, stocks, funds, and securities, in trust for all and every the respective issues of his said daughters, *whether sons or daughters*, living at the time of the respective deceases of his said daughters, in equal shares and proportions, and to be paid and payable, if sons, on their attaining their respective ages of twenty-one years, and if daughters, at their respective ages of twenty-three years. But if any or either of his said daughters should depart this life without leaving *any such issue*, or having left *any issue*, all such issue should happen to depart this life before attaining their re-

The word "issue" may be restricted so as to mean children, and conversely the word "children" may, from the context, be enlarged so as to be construed "issue;" each case depends on the peculiar expressions used, and the structure of the sentences. If the case be doubtful, the Court prefers that construction which will most benefit the testator's family, on the supposition that this must more nearly correspond with his intention.

1846.  
 FARRANT  
 v.  
 NICHOLS.

spective ages of twenty-one years, being sons, and being daughters, their respective ages of twenty-three years, then upon trust that his trustees, &c., should stand possessed of the part or share, or proportion, parts, shares, or proportions, of his said daughter or daughters, who should depart this life without leaving any issue, or having left any issue, such issue should not live to attain a vested interest of and in such trust monies, stocks, funds, and securities, and the interest, dividends, and annual proceeds thereof, in trust for his surviving daughter or daughters and their respective issues; and to be paid, assigned, and transferred to them, at the times and in the same manner as their original parts, shares, and proportions, of and in the said trust monies, stocks, funds, and securities, would become payable, assignable, and transferable.

Provided always, that if all his said three daughters should depart this life without leaving any issue, or having left any issue, all such issue should depart this life before attaining a vested or transferable interest in such trust monies &c., then he willed and directed, that the trustees, &c., should stand possessed of the said trust monies, stocks, funds, or securities, in trust for his next of kin.

The testator's daughter, *Mary*, died in 1845, leaving three children and ten grandchildren surviving her. She had had another child who had pre-deceased her, leaving two children, *G. H. Nichols* and *Ella Nichols*.

The question was, as to the meaning of the word "issue."

Mr. Roupell and Mr. Campbell, for the Plaintiffs. Though the word "issue" will comprehend all descendants,

scendants, yet, upon the particular words used, it may be confined to children. *Sibley v. Perry* (a), *Horsepool v. Watson* (b). Here the testator has put his own construction on the word, and has defined the meaning of the expression to be "sons or daughters." The subsequent expressions cannot be taken as extending the previous restricted sense of the word.

1846.  
  
 FARRANT  
 v.  
 NICHOLS.

Mr. *Kindersley* and Mr. *Waley*, for the children, *G. H. Nichols* and *E. Nichols*, contended that, as issue living at the death of the mother, they were entitled to participate in the fund. They argued, that the word "issue" was unrestricted, and the other words, "sons or daughters" were equally so, for whether children or grandchildren, they were still sons and daughters. That the words sons and daughters were, therefore, equivalent to "males or females." That even the word "children" might be extended to mean grandchildren, *Gale v. Bennet* (c). That their construction was clear from the gift over on failure of "any issue," which shewed that the testator did not intend that the property should go over, until all the issue of his daughters had been exhausted. That the Court would give such a convenient construction to the words, as to make the provision extend to all the family.

Mr. *Roupell*, in reply.

*The MASTER of the ROLLS.*

In ascertaining the true effect and meaning of a will, you are to look, not at particular words only, but you must have regard to the whole context, and see how far

(a) 7 Ves. 522.

(b) 3 Ves. 383.

(c) *Ambler*, 681.



# CASES IN CHANCERY.

846.  
ARRANT  
v.  
NICHOLS.

far the particular words are affected by the other expressions in the same will. This is constantly done in endeavouring to ascertain the effect of the words "issue" and "children." The word "issue" may be restricted so as to mean children; and, conversely, the word "children" may, from the context, be enlarged so as to be construed "issue" generally. Each case depends on the peculiar expressions used, and the structure of the sentences; but if the case be doubtful, the Court so far as it can will prefer that construction which will most benefit the testator's family generally, on the supposition that this must more nearly correspond with his intention.

In this particular case, the trust is declared "for all and every the respective issues of his said daughters, whether sons or daughters," &c. &c.

On the meaning of these words, standing by themselves, I can have no doubt; the testator speaks of the issue of his daughters "whether sons or daughters." The subsequent words "such issue" is a relative expression, and the general rule is to go back to the last antecedent, and we there find the "issue" limited to "sons or daughters." I think that the testator must be understood to have put his own construction on the word "issue," and to mean the "sons or daughters" of his daughters.

It is said, that, from the context, I am to collect a different meaning; that the expression "sons or daughters" is not used in its ordinary sense, and confined to the first stage of the issue of the daughters; but must mean something more general, namely, "males or females." These words, "sons or daughters," would have a restrictive effect, and the word "issue" would

would be left in its original large signification. The effect would be to strike out the words "whether sons or daughters" altogether.

1846.  
FARRANT  
v.  
NICHOLS.

Then comes the argument from the gift over, on the daughters dying without leaving "any issue." That is the most important argument; but I do not think it is capable of being sustained, because the testator in using the word "issue" has expressed himself very vaguely. He speaks of "issue, whether sons or daughters," and afterwards "such issue," and "any issue;" and I think he refers to some antecedent meaning, namely, the issue restricted to sons or daughters.

I am of opinion that the restriction put on the words, in the first instance, is not enlarged by the subsequent expressions; and the declaration of the Court must, therefore, be in favour of the restricted sense. The effect is, to deprive two of the parties of that share to which their mother, if she had lived a little longer, would have been entitled.

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1846.

April 15.

*In re* LOVELL.

Upon a taxation, not in a cause, a sum was found due to a solicitor from his client. Held, that to compel payment, proceedings must be had under the old practice, and not under the 11th Order of August, 1841.

IN November 1845, Mr. Carey obtained an order for the taxation of his solicitors, Messrs. Lovell's, bill, and in March 1846, the Master found that 100*l.* 15*s.* 7*d.* was due to the solicitors. An application was made for payment, but declined.

Mr. Kindersley now applied for process to compel payment, and (the proceeding not being in a cause) a question was raised, whether the solicitors were entitled to an attachment under the 11th General Order of August 1841 (a), or must proceed as heretofore. (b)

*The MASTER of the ROLLS.*

You must proceed under the old practice: take an order for payment within ten days. (c)

(a) *Ordines Can.* 166.

(b) See *Seton on Decrees*, 432.

(c) See *In re Blake and*

*Young, antè*, 209.

1846.

## MARTIN v. SEDGWICK.

June 2, 3.

**T**HE Rock Life Assurance Company was a proprietary Joint Stock Company, established by deed in 1807, by the stipulations in which every proprietor was under an obligation to keep on foot assurances in the Company, to the extent of 5*l.* on each share held by him in the capital of the Company. In 1822, *John Sedgwick* was insured in the Company to the extent of 3000*l.*, which enabled him to hold 400 shares in the Company though he possessed none. At the same time, *Robert B. Dunlop* being desirous of increasing the number of his shares without increasing his insurance, arranged with *John Sedgwick* to purchase 200 shares and transfer them into the name of *John Sedgwick* as his trustee. This was accordingly done, and on the 6th of November 1822, *Sedgwick* gave *Dunlop* a written declaration that he held them in trust. No notice was ever given to the Rock Office of the declaration, or of the nature of the transaction, but *Sedgwick* remained the ostensible owner of the shares, received the dividends, and accounted for them to *Dunlop*.

After this, in August 1833, *Sedgwick* mortgaged the 200 shares to Mrs. *Sutherland* for securing 800*l.*, and notice of the assignment was, three days after, given to the Rock Office, and entered in their books. Further advances were afterwards made to *Sedgwick* by Mrs. *Sutherland* on the security of the shares and other property; and notice was given to the Office. By subsequent arrangements between them, some part of the property included in the security was realised, and the mortgage debt became reduced.

On a question of priority of incumbrances on shares, notice to one of a Joint Stock Company is not notice to the Company.

*A.* held shares as trustee and executed a declaration of trust, but no notice was given at the office of the Company. *A.* afterwards mortgaged his shares to secure his private debt. Notice of this mortgage was given to the Company, and was entered in their books. Held, that the mortgagee had priority over the *cestui que trust*.

*Sedgwick*

1846.  
  
 MARTIN  
 v.  
 SEDGWICK.

*Sedgwick* became insolvent, and the fraud being discovered, the suit was instituted by the representatives of *Mrs. Sutherland*, against the representatives of *Dunlop* and others, for the purpose of establishing the priority of *Sutherland* over *Dunlop*, and to obtain payment.

Mr. *Turner* and Mr. *Stevens*, for the Plaintiffs. *Dunlop* neglected to give notice of the trust in his favour, and *Mrs. Sutherland* having first given notice, obtained thereby priority over him. *Dearle v. Hall* (a), *Love-ridge v. Cooper* (b), *Foster v. Blackstone* (c), *Etty v. Bridges* (d), *Greening v. Beckford*. (e)

It will be argued, that the notice possessed by *Sedgwick*, a partner in the *Rock*, affected the whole Company, and *Duncan v. Chamberlayne* (g), will be relied on for that proposition, but that case has been since overruled by the judge who pronounced it. *Thompson v. Speirs* (h). It would be extraordinary that all the shareholders should be deemed to have notice of a fraud committed by one of their body, which he would naturally conceal from them. By the negligence of *Dunlop*, *Sedgwick* was enabled to practise a fraud, which no prudence or caution, on the part of persons dealing with him, could have protected them from; *Mrs. Sutherland* therefore has a better equity.

Mr. *Teed* and Mr. *Hargrave*, for a subsequent incumbrancer.

Mr. *Gaselee* for the *Rock* Company submitted, whether, in the absence of *Sedgwick*, who was out of the jurisdiction,

(a) 3 *Russ.* 1.

(b) 3 *Russ.* 30.

(c) 1 *Myl. & K.* 297., and 9 *Bli.* 332.

(d) 2 *Y. & C. (C. C.)* 486.

(e) 5 *Sim.* 195.

(g) 11 *Simons*, 123.

(h) 13 *Simons*, 469.

tion, there could be a sale of the shares as asked by the Plaintiffs.

1846.

MARTIN  
v.  
SEDGWICK.

Mr. Kindersley and Mr. Heathfield, *contra*, for the parties representing *Dunlop*, argued, first, that the assignment of 1833 was insufficient in form; it purported to assign "all those 200 shares of *him*, the said *J. Sedgwick*," then standing in his name, without specifying the numbers.

[*The MASTER of the ROLLS.* But it appears from the evidence he had no others.]

Secondly, that the subsequent dealings between Mrs. *Sutherland* and *Sedgwick* so varied the nature of the transaction and the situation of the parties, as to destroy the effect of the notice to the Company.

Thirdly, that the technical and modern doctrine of notice did not apply to this case; and that if it did, then, that the rule of law was, that notice to one partner was notice to all, and that such rule was totally independent of the number of partners, and applied as much to a case of numerous parties as to one of a limited number. That the cases, *Duncan v. Chamberlayne*, and *Thompson v. Speirs*, applied only to the statutory doctrine of "*order and disposition*" and not to a trust, where no notice was necessary to perfect it, *Pinkett v. Wright* (a), the declaration of trust being sufficient for that purpose. That a trustee, dealing with trust property, could not give to his incumbrancer a better title than he had himself, unless he passed a legal title (b); that this was a case of an equitable, and not of

(a) 2 *Hare*, p. 137., affirmed by the House of Lords, 13th August 1846. (b) See *Ord v. White Beavan*, 357.

1846.  
  
 MARTIN  
 v.  
 SEDGWICK.

of a legal interest, and that *Sutherland* could not enforce it at law.

Mr. *Turner*, in reply.

*The MASTER of the ROLLS.*

This is one of those unfortunate cases, where the Court is called on to determine, which of two innocent persons is to bear the loss occasioned by a very serious fraud of a third party.

In the view I take of this case, I may assume that the principal Defendant has made out the claim which he alleges by his answer. The first question which is made here is this, whether, inasmuch as by the constitution of the Company a shareholder is a partner and as by the ordinary rule of law, notice to one partner is a notice to the others, it must not be assumed, that, at the time when the transfer was made by *Sedgwick* upon trust, the whole Company had such distinct notice of the creation of the trust, that the same effect is to be given to it, as if there had been a regular formal notice given in the usual manner. I am of opinion that that is not the case. It would put an end to that important doctrine, by which security is afforded to assignments accompanied with notice to the trustee or holder, and by which a good assignment and security is effected so as to prevent it from being defeated by any subsequent assignment. There was nothing to hinder *Dunlop* from giving that notice, which would have perfectly secured him against any subsequent dealing with this fund by *Sedgwick*. That notice was not given. The result was, that these 200 shares remained standing in his name in the books of the Company unfettered by any such notice, and he was left

left entirely at liberty, without the possibility of any other parties guarding themselves against his improper acts, to dispose of those shares in any manner which the rules of the company allowed; and so he continued. It is alleged, and proved to some extent, that during the whole period which elapsed from the time of this transfer, the dividends arising on the shares were paid to *Dunlop*. Having these shares standing in his name unfettered, and being the apparent owner, he, in the month of *August* 1833, applies to *Mrs. Sutherland* for a loan of money, on the security of these shares alleged to be his own. She advanced the money to him, and he executed the assignment. It has been ingeniously argued, that from the nature of that assignment, and the want of a proper specification of the particular shares by numbers, the assignment ought to be held inoperative as to those particular shares. I cannot agree with that argument, for *Sedgwick* had these 200 shares and no others. He assigned the shares of him, *John Sedgwick*; and it is very true, that they were not the shares of him *John Sedgwick* absolutely: they appeared, however, in the Books to be his shares, though, if all the transactions relating to them had been known, it would have appeared that they were subject to the equity created by his agreement to hold them in trust for other persons, although this had not been stated in such a manner as to enable any other person to know it. I am of opinion, therefore, that they passed.

Immediately after the assignment had been made, a formal notice of it and of its purpose to secure money was given to the company, and entered in their books. By that means, this lady did guard herself against any future disposition of this property by *Sedgwick* to any person whatsoever. She afterwards advanced further sums of money, and, in *October* 1834, the whole



1846.

MARTIN  
v.  
SEDGWICK.

amounted to 2100*l.*, and other property, namely, some leaseholds, policies of insurance, and shares in another office were then included in the security. Afterwards, by arrangements between her and *Sedgwick*, (who all the time appeared to her to be the absolute owner, and appeared so only because *Mr. Dunlop* had omitted to place any thing upon the books of the company, or to give them any notice,) some part of the property was realized and applied in reduction of her demand. She had a perfect and just right to do so. May not a person who advances money upon security to a person who seems to be the owner of the property pledged, make arrangements with him to dispose of part of the property and apply it in reduction of the debt? Is there any thing to hinder it, or to prejudice the right over the property not disposed of? If any notice had been then given of the claim of *Mr. Dunlop*, the case might have been otherwise. He might, consistently with the full satisfaction of *Mrs. Sutherland*, have some right to management or marshalling of the property in such a way as to diminish the effect of the fraud committed by *Sedgwick*. However, there was no notice, and the consequence was, there was nothing to fetter *Mrs. Sutherland* and *John Sedgwick*, or to prevent the dealing with that property in such a way as might be agreed upon between them. Suppose the principal Defendant to have the right which I have assumed him to have, and that a trust were created, he has, in consequence of that, a right to ask for an account of all the sums of money which *Mrs. Sutherland* may have received in reduction of her demand. He may have a right, consistently with full payment to her, to insist on standing in her place, and on the benefit of all her securities. Something of that sort might or may now be done; but I apprehend, in this state of things, the Plaintiff has a clear right to have an account taken of what remains due upon those securities, and that this right is to

to be now maintained in priority to the right which is claimed by the principal Defendant, supposing that right to be fully established.

1846.  
MARTIN  
v.  
SEDGWICK.

Other questions may arise between the co-Defendants, but I cannot, on this occasion, determine any thing as between them.

TANNER v. DANCEY.

Feb. 27.

**T**HIS was a bill filed by one of several residuary legatees under the will of Mrs. *Mary Cromwell*, for the administration of her estate. The accounts were taken in the Master's office, and a small balance was found due from the executor Mr. *Dancey*.

Whether it is regular to present a petition to come on with the cause on further directions, for the purpose of stating circumstances occurring since the filing of the bill, with a view only to the adjudication of the costs of suit. *Semb'le* not.

The cause came on for further directions, when a petition was presented by the Plaintiff *Tanner*, containing allegations of facts and conduct on the part of *Dancey*, subsequent to the filing of the bill, from which the Plaintiff sought to charge him with the costs of the suit. The petition was supported by affidavit.

Where the fund is deficient, the executors' costs of an administration suit are paid there-out in priority of those of the other parties.

Mr. *Turner* and Mr. *T. B. Saunders*, for the Plaintiff, were proceeding to open the petition, when,

Mr. *Kindersley* and Mr. *Elderton*, for the executor, objected to the hearing of the petition as irregular. They said, that this was an anomalous proceeding, and, if countenanced, would introduce a mischievous and dangerous innovation in the practice of the Court. Here was a suit for the administration of an estate, a

1846.

TANNER  
v.  
DANCEY.

decree was made, and the case coming on for further directions, the Plaintiff presented a petition, not for the purpose of working out the decree, or asking any thing arising out of it, but to induce the Court, in deciding the question of costs, to be governed by some negotiations, which, it was said, had taken place between the parties since the decree, and praying merely that the Defendant might pay the costs. That such a proceeding was without precedent or authority. That a Defendant had a right to have his cause determined on the merits appearing on the pleadings, and on the question of costs was entitled to read his answer (a). That he was not to be deprived of that right, by allowing the Plaintiff to present a petition, and that the Plaintiff was not to be permitted to read his own affidavit, in opposition to the Defendant's answer.

Mr. Turner, *contra*. Where, in the prosecution of suit, a party pursues an unreasonable and improper course of conduct, entailing on the parties unnecessary costs, and producing useless litigation, the Court will deprive him of costs.

There must be some mode of bringing the facts before the Court for its adjudication, and the matter not being in issue, and being subsequent to the filing of the bill, it seems that the most correct mode of proceeding is to bring it to the attention of the Court by petition, in order to give the opposite party an opportunity of meeting the new allegations. Sir A. Herbert held, that "a letter written by the Defendant, the executor, after bill filed, offering to submit to arbitration, might be looked at on the question of costs." (b)

(a) *Vancouver v. Bliss*, 11 Ves. 458.; *Howel v. George*, 1 Mad. p. 13., and see *Whitley v. Martin*, 3 Beav. 226.

(b) *Meader v. M'Cready*, 1 Molloy, 119.

*The MASTER of the ROLLS.* The costs, generally, depend on the proceedings in the suit, and the question is, whether a Plaintiff can alter the result by presenting a special petition. I must have some authority for such a proceeding. Everybody acquainted with the course of practice of the Court knows how formidable a proceeding a discussion of costs is already. I must know what the facts of the case are as they stand on the record, and I think that it will be more convenient to hear the merits of the petition before deciding on the question of the regularity of the proceeding.

1846.  
TANNER  
v.  
DANCEY.

Mr. *Turner* and Mr. *T. B. Saunders* then proceeded to open the case, and to argue the merits of the petition. They insisted, that the Defendant ought to have no costs; and, secondly, that the costs of all parties should, in the first instance, be paid rateably out of the fund in Court.

Mr. *Roupell* and Mr. *Hansard* for other parties.

Mr. *Kindersley contra*, said he would not go into the merits of the petition, unless required by the Court, and would rest on the irregularity of the proceeding. He asked, that the costs of the executor might be paid out of the fund in priority of the Plaintiff and other parties, and said that the Master of the Rolls had so decided in some former case. (a)

Mr. *Turner*, in reply, admitted that such a decision had been made, but, with regard to the regularity of the proceeding, he said, that if such a petition as this were not allowed, material facts could never be properly brought before the Court.

*The*

(a) See *Otley v. Gilby*, 8 *Beavan*, 602.

1846.

TANNER  
v.  
DANCEY.

*The MASTER of the ROLLS.* I do not lay down any such general proposition, but I must express my surprise and regret at this sort of experiment being made; and in dismissing this petition with costs, I shall not waste more time in giving reasons, further than this, that in my opinion, the Defendant has done nothing to forfeit his right to that which the course of the Court entitles him to, of having his costs of suit, and he is entitled to them out of the fund, in priority to the costs of the other parties.

April 16.

*In re SMITH.*

Interest on a bill of costs while under taxation not allowed.

Taxation of a bill was directed on the terms of paying a sum of money into Court. The fund accumulated. Held that the solicitor was not entitled to the stock and the benefit of the accumulations, but that the whole must be sold and the produce applied in part discharge of the bill.

**M**R. *HUSBAND*, a country solicitor, obtained an order for the taxation of the bills of costs of Mr. *Smith*, his town agent, upon condition of bringing the sum of 1000*l* into Court. (a) This sum was accordingly paid into Court, and the dividends had been accumulated since 1841.

The bills, amounting to 9176*l*. 6*s*. 8*d*., were taxed at 8751*l*. 17*s*. 10*d*., and a balance of 2832*l*. 5*s*. 3*d*. was, on the whole, found due to Mr. *Smith*. Mr. *Husband* presented a petition for liberty to except to the Master's report, but it was dismissed with costs. (b)

The case now came on upon petition to obtain a transfer of the fund and payment of the balance due.

Mr.

(a) 4 *Beav.* 309.(b) *Antè*, 182.

**Mr. Kindersley** and **Mr. W. T. S. Daniel**, for **Mr. Smith** the petitioner, raised three points. First, they asked for interest on the amount due from 1840, when it was demanded : on this point *Seton* on Decrees, p. 38 n., *Creuze v. Hunter* (a), and 3 & 4 W. 4. c. 42. sec. 28, 29., were cited. Secondly, they asked for the costs of the taxation and of the present petition ; and thirdly, they contended that **Mr. Smith** was entitled to receive the accumulated fund in court, as 1000*l.* paid on account.

1846.

In re  
SMITH.

*The MASTER of the ROLLS* said, that he would relieve the respondent's counsel from some of these questions ; that he did not think he could give the petitioner interest on the bills of costs ; and as to the fund in court, he was of opinion that it must be sold and paid over to **Smith**, in part discharge of his demand.

**Mr. Turner** and **Mr. Cole**, for **Mr. Husband**, then went into the particulars and the circumstances attending the taxation, and argued therefrom, that the conduct of **Mr. Smith** in the matter had disentitled him to the costs of taxation and of this petition.

*The MASTER of the ROLLS.*

When I heard the first petition I considered this a very painful case : there were circumstances of conduct which I could not hear without great regret, and on which it became my duty to express my opinion. **Mr. Smith** has, in consequence of these circumstances, suffered very severely, but the taxation has turned out creditable to him, for a very small sum has been taken off his bill. Although several charges could not be substantiated because they had not been paid, still, in point of fact,

(a) 2 Ves. jun. p. 164.

1846.

*In re*  
SMITH.

fact, the taxation has resulted in a comparatively low sum being taken off, and the amount is not such as would, under ordinary circumstances, disentitle him to his costs of taxation.

Then comes the question, whether any thing has occurred to deprive him of the benefit of the ordinary rule laid down in conformity with the former statute. I think there is not. He has been the subject of censure, but on taxing the accounts, the result is, that so small a sum has been taken off, that I think he is entitled to the costs of the taxation.

He has asked for payment of interest on the amount found due: I am of opinion that he is not entitled to interest. The subject is one which, having regard to the practice of the Court, would require great consideration before interest could be allowed. I have heard it said, that it would be for the benefit not only of the solicitor, but of the client, that the solicitor should be entitled to interest on his disbursements; but I have never before heard it said, that it would benefit a client to allow interest on his solicitor's professional charges.

I must dismiss with costs so much of this petition as seeks to charge the respondent with interest; I must order the sale of the fund in Court, and must direct the produce to be paid to Mr. *Smith*, in part discharge of the 2832*l.*; and I must order *Husband* to pay to *Smith* the balance, together with the costs of the taxation.

1846.

JONES v. POWELL

April 18.

**T**HIS was a petition for increased maintenance of infants. The infants were resident with their mother, who, together with a Mr. *Paterson*, had been appointed testamentary guardians.

The Court exercises a control in respect of any allowance ordered to be paid to a testamentary guardian, and on the marriage of a female testamentary guardian to whom an allowance for maintenance has been ordered to be made, inquires into the altered state of circumstances

Since the last order for maintenance the mother had married a Mr. *Phillips*.

Mr. *Kindersley* in support of the petition.

*The MASTER of the ROLLS.*

The guardian having married again, it seems right to have some inquiry. (a)

Mr. *Kindersley*.

This is not a case of a guardian appointed by the Court, but a testamentary guardian, over whom, in the absence of improper conduct, this Court exercises no control (b); and then only on a bill being filed. Testamentary guardians differ materially from guardians appointed by the Court. "If a feme guardian marry, the guardianship is not transferred to the husband, nor shall it be forfeited by the attainder or misdemeanor of the husband" (c), and such a guardianship given to two or more will survive on the death of one. Here Mrs. *Phillips* is not the sole guardian, Mr. *Paterson* is entitled to the joint guardianship.

*The*

(a) See *In re Gornall*, 1 *Beav.* 347. 6 *Mad.* 275., and *Dillon v. Caswell*, 4 *Bro. P. C.* (Toml.) 306.

(b) See *Ingham v. Bickerdike*, (c) 4 *Com. Dig.* 384.



1846.

JONES

v.

POWELL.

*The MASTER of the ROLLS.*

Where a feme sole appointed by the Court to be guardian of infants marries, the first thing is to refer it to the Master to appoint a guardian, not for the purpose of removing her from the guardianship, but to ascertain what ought to be done under the altered state of circumstances.

The Court does not ordinarily interfere with a testamentary guardian, but it has an undoubted control over any allowance directed to be paid to him, and if such a guardian, being a feme sole, marries, it seems right to see what ought to be done. It may probably be the most beneficial thing to continue the feme covert guardian, but it ought, in some way or other, to appear. I think I must require it to be shown by affidavit, that it will be for the benefit of the infants to continue to reside with their mother, notwithstanding her second marriage.

1846.

MALDEN v. FYSON.

March 13.

**T**HIS was a bill filed by the purchaser against the vendor for a specific performance. The Defendant by his answer, insisted he could shew a good title. A reference was made to the Master on the title, and it turned out that the Defendant was unable to make a good title to the premises, and the report had been confirmed.

Where a bill for specific performance is filed by a purchaser, and it turns out that the vendor cannot make a good title, the bill is dismissed, but without costs.

**T**his cause came on upon the report, when,

**M**r. *Bloxam*, in the absence of Mr. *Turner*, for the Plaintiff, asked that the bill might be dismissed without costs; leaving the purchaser to his remedy at law; he cited *Lord Anson v. Hodges*. (a)

**M**r. *Kindersley*, *contra*.

**T**homas v. *Dering* (b) and *Anson v. Hodges* (c) were cited.

**T**he MASTER of the ROLLS. My impression is, that in such cases the bill is dismissed without costs. I think that this has now become the rule.

(a) 5 *Simons*, 227.

(c) 5 *Simons*, 227.

(b) 1 *Keen*, 729.

1846.

March, 28.  
June 27.

## ROWLEY v. ADAMS.

Motion by a party to a suit to stay proceeding to sell an estate pending an appeal refused with costs, the applicant not having himself appealed.

**T**HIS cause is reported, *antè*. (a) It there appears, that the testator gave two legacies of 12,000*l.*, payable primarily out of his "surplus capital," but charged in the second place on his real estate. **T**he bill charged the executors with wilful default in not having obtained payment of the legacies out of the "surplus capital." In that respect it failed, but the legatees having made *bond fide* endeavours to realize the primary fund on which legacies were charged, but having failed to prove the existence of such primary fund, by reason of the non-production of the account books, the real estate (being the secondary fund) was directed to be sold for payment of the legacies. Part of the real estate, thus directed to be sold, had been devised to *William Wyatt*. The Plaintiff had appealed to the House of Lords from the decree of the Master of the Rolls, but not from the order directing the sale of the real estate.

*William Wyatt* had not, however, lodged any appeal.

Mr. *Wray*, for *W. Wyatt*, now moved to stay the sale pending the appeal. He argued, that if the judgment were reversed, there would be no necessity for selling the real estate, as it was only subject to a secondary liability; and that it would be an irreparable injury to the party entitled to the estate to have a forced sale, should it afterwards turn out to be improper.

**M**r.

(a) 7 *Beavan*, 395. 548.

*Mr. Temple, Mr. Turner, Mr. K. Parker, Mr. Kindersley, and Mr. Adams* for different parties.

1846.

ROWLEY  
v.  
ADAMS.

*The MASTER of the ROLLS* said, that if the applicant **had** not appealed from the order to sell he could not **interfere**, and he refused the motion with costs.

*William Wyatt* afterwards appealed from the decree, **and** the order directing the sale of the real estate, and,

*Mr. Wray* now renewed the motion.

June 27.

Being a family suit the other parties did not oppose **the** motion, but left it to the discretion of the Court; **and** the estate being in the hands of a receiver,

*The MASTER of the ROLLS* made the order.

LOCKHART v. HARDY.

March 7.  
April 18.

**T**HIS case came before the Court, upon exceptions to the Master's report.

After foreclosure, the mortgagee fairly sold the estate for less than what was due to him. Held that he 1828, could not afterwards re-

The case, as appearing by the Master's report and the admissions of the parties, was, that in the year

cover from the mortgagor, upon his collateral personal securities, the amount still remaining unpaid.

Where a debt is secured by mortgage, covenant, and bond, the mortgagee may pursue all his remedies at the same time. If he obtain full payment on the bond or covenant, the mortgagor becomes entitled to the estate, but if he obtain part payment only, he may go on with his foreclosure suit and foreclose for the remainder. On the other hand, if he forecloses first, and the value of the estate proves insufficient to satisfy the debt, he may, while the mortgaged estate remains in his power, sue on the bond or covenant, but he thereby opens the foreclosure, and the mortgagor may thereupon redeem.

1846.  
  
 LOCKHART  
 v.  
 HARDY.

1828, a person of the name of *Smith* conveyed an estate to *John Ingram Lockhart*, by way of mortgage to secure the repayment of the sum of 2999*l.* lent, and afterwards, on the 14th of *December* 1829, he executed a deed, whereby he created a further charge on the same estate, in favour of *Lockhart*, for the sum of 500*l.* *John Ingram Lockhart* being entitled to this mortgage, borrowed of or became indebted to *William Browne*, since deceased, in the sum of 1600*l.*, and by deed dated the 17th of *August* 183 made between *Lockhart* of the first part, *Smith* of the second part, and *William Browne* of the third part, consideration of 1600*l.* due from *Lockhart* to *Browne*, the mortgage debts of 2999*l.* and 500*l.* were assigned to *Browne*, on trust, amongst other things, to pay costs to satisfy the 1600*l.* and interest, and to pay the surplus to *Lockhart*; and the mortgaged estate was conveyed to *Browne*, subject to a proviso for redemption on the payment of 1600*l.* and interest, which were further secured by a covenant and bond.

*Browne* died in *December* 1831, and *William Browne* and *John Browne*, became his legal personal representatives.

*John Ingram Lockhart* died in *August* 1835, and *Alder* was his legal personal representative.

A bill was filed by the *Brownes* to foreclose the mortgage estate, and on the 20th of *December* 1841, a decree was made in the usual manner for accounts and foreclosure.

On the 2nd of *May* 1842, the Master reported, that on the mortgage to *Lockhart* there was due from *Smith* to *Lockhart's* estate 5436*l.* 0*s.* 3*d.*, and that on the mortgage from *Lockhart* to *Browne* there was due from the  
 estate

estate of *Lockhart* to the estate of *Browne* the sum of 2136*l.* 12*s.* 9*d.* A day was, in the usual manner, appointed for payment, and default being made, the mortgaged estate was foreclosed, as against *Smith*, on the 9th of December 1842. On the 2nd of February 1843, it was reported, that 2401*l.* 18*s.* 7*d.* was due to the estate of *Browne* from the estate of *Lockhart*; a day was appointed for payment, and default being made, the mortgage was ultimately foreclosed as against *Alder* and the *Lockharts*.

1846.  
LOCKHART  
v.  
HARDY.

After this, the *Brownes*, being in possession of the mortgaged estate, sold it absolutely to Mr. *Tomlinson* for 1999*l.*, and the estate was conveyed to him, and was now entirely out of the power of the *Brownes*. It was admitted that the estate had been fairly sold.

A decree was afterwards made for the administration of the estate of *John Ingram Lockhart*. The *Brownes* went in under the decree, and claimed to be allowed to prove, on the bond, for the residue of the mortgage debt after deducting the purchase-money, as a debt on the covenant or bond, against the estate of *John Ingram Lockhart*; and the Master having allowed their claim to the amount of 642*l.* 8*s.* 11*d.*, Mr. *Alder*, the legal personal representative of *John Ingram Lockhart*, took exceptions to the report, and alleged that nothing ought to have been found due to the *Brownes*.

Mr. *Kindersley* and Mr. *Lloyd*, in support of the exceptions. After foreclosure and subsequent sale, the mortgagee cannot proceed against the mortgagor on his other securities. The mortgagee having sold the estate at his own risk, and for his own benefit, cannot, in the case of its producing less than his debt, call on the mortgagor to make good the deficiency, any more than

1846.  
  
 LOCKHART  
 v.  
 HARDY.

the mortgagor, if the estate sold for double the amount of the debt, could insist on the return of the surplus. The original contract is a mere pledge of the estate which the mortgagee undertakes to restore on full payment of the debt. By foreclosure, the mortgagee has elected to take the estate in satisfaction of the debt, which, in equity, has become extinguished, by the conversion of the holder of the pledge into an absolute owner of the mortgaged property. The mortgagee may still at law proceed on his other securities, but a Court of Equity will not allow him to proceed, unless he restores the pledge on full payment of what is due, in other words, he opens the foreclosure; but if, by his course of dealing with the property, the mortgagee has disabled himself from restoring the pledge, after taking it by foreclosure, he will not be permitted to sue the mortgagor on the other securities.

The case of *Tooke v. Hartley* (a) does not apply, for there the estate (as was observed by Lord Eldon in *Perry v. Barker* (b)), "sold or not was in the possession of the mortgagee." He could therefore give effect to the rights of the mortgagor consequent upon the opening of the foreclosure. Here the estate is admitted to be completely out of the mortgagee's power.

The mortgage contains no power of sale, and this Court has no jurisdiction to direct a sale of the estate for the satisfaction of the mortgage debt; but if this course of proceeding by a mortgagee be sanctioned, the mortgagee will obtain, indirectly, that to which he is entitled neither by contract nor by the course of the Court. It would be unjust to bind a mortgagor by a sale,

(a) 2 *Brown*, C. C. 125., and  
*Dickens*, 785.

(b) 8 *Ves.* p. 530., and see *S. C.*  
 13 *Ves.* 198.

sale, made without his concurrence, and in his absence, or to permit a mortgagee to sell the estate at the risk of a mortgagor, after a lapse of time, and when the estate may perhaps have become deteriorated. The tendency of Lord Eldon's remarks in *Perry v. Barker* is certainly against any such equity, and that is confirmed by the ultimate decision in the case (a) made by Lord Erskine, after a communication with Lord Redesdale, when the Court was of opinion that the foreclosure was opened; and that, if there were any probability that the mortgagee could get the estate back again, he ought to have a time limited for that purpose: here it is admitted to be impossible.

1816.  
  
 LOCKHART  
 v.  
 HARDY.

Mr. Lowndes, for other parties in the same interest.

Mr. Turner and Mr. Shapter, for the Brownes. Nothing has occurred to overrule the "clear opinion" of Lord Thurlow in *Tooke v. Hartley*: "that an action might be brought for the difference if the mortgaged estate were sold out and out, fairly, without collusion, and for the best price, and not as (through some mistake) stated in *Perry v. Barker* (b), if the estate still remained in the possession of the mortgagee." (c) It is evident both from the note of Chief Baron Richards (c), and the report of the same case in *Dickens* (d), that the estate was not in the possession of the mortgagee. According to the report of *Tooke v. Hartley* contained in *Dickens* (d), Lord Thurlow was clear that the Defendant, the mortgagee, under the mortgagor's covenant in the mortgage deed, was entitled to be paid what was due on the mortgage; that so long as he kept the estate,

(a) 13 Ves. 198.

(b) 8 Ves. p. 531.

(c) See 2 Bro. C. C. 125 n.

(Bell's ed.)

(d) 2 Dickens, 785.



1846.  
  
 LOCKHART  
 v.  
 HARDY.

estate, he must take the pledge as a satisfaction, because by not knowing what it would produce, he could not say anything was due, but if he sold the estate fairly, and without collusion, and for the best price, it would then appear whether it produced the amount of the money reported due, and to the extent of what it did not, the mortgagee had a right, and so it was now established, to bring an action against the mortgagor to recover the deficiency, and therefore his Lordship disallowed the cause, and dissolved the injunction.

It must be remembered, that the mortgagee has a legal right which ought not to be controlled by a Court of Equity, except on principles of equity. The debt remains unpaid, the value of the pledge has been fairly realised, and the deficiency ascertained; why, while there is a legal contract for repayment, a legal remedy to recover it, and a sufficiency of assets, is a mortgagee to be deprived of payment of his just debt?

They also referred to *Mason v. Bagg (a)*, and *Dyson v. Morris. (b)*

Mr. Kindersley, in reply.

*The MASTER of the ROLLS.*

The contract, in this case, consisted of a pledge of land accompanied by a covenant and bond, and the mortgagor expected, no doubt, that on full payment of the debt he would have the estate back again.

A mortgagee may pursue all his remedies at the same time. If he obtains full payment by suing on the

(a) 2 Myl. & Cr. 443.

(b) 1 Hare, 413., and 2 Pow.  
 Mortg. 1001. n.

the bond he prevents a foreclosure. If only part payment is obtained, he must account for what he has received, and may foreclose for the residue. If a mortgagee obtains a foreclosure first, and alleges that the value of the estate is insufficient to pay what is due to him, he is not precluded from suing on the bond; but if he thinks fit to do so, he must give the mortgagor a new right to redeem notwithstanding the foreclosure, and the mortgagor may file a bill to redeem. I apprehend that so long as the mortgagee holds the estate, and is able to give effect to the mortgagor's right to redeem, he may proceed on the bond.

1846.  
  
 LOCKHART  
 v.  
 HARDY.

But that is not the question here; for the mortgagee has foreclosed, and afterwards sold the estate, and he now proceeds on the bond. But how can the estate be had back? Lord *Thurlow* thought, that if the estate were properly sold, the mortgagee might recover the difference. Lord *Eldon* seems to have entertained a different opinion, and the question now before me seems to be to determine between these conflicting opinions. I will take time to consider.

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*The MASTER of the ROLLS.*

*April 18.*

It must be borne in mind, that this is a case of mortgage with other securities, and not a case of trust to sell, accompanied by other securities.

It is decided, that if a debt is secured by the mortgage of a real estate, and also by covenant and by bond, the mortgagee may pursue all his remedies at the same time. If he obtains full payment on the bond or covenant, the mortgagor is, by the fact of payment,

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ment,

1846.  
 LOCKHART  
 v.  
 HARDY.

ment, entitled to redeem the estate, and foreclosure ~~is~~ is prevented or not allowed.

But if the mortgagee obtains only part payment ~~on~~ on the bond or covenant, he may go on with his fore- ~~re-~~ closure suit, and giving credit, in account, for the ~~at~~ at which he has recovered on the bond or covenant, ~~he~~ he may foreclose for nonpayment of the remainder.

On the other hand, if he obtains foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant. But it is held that by doing so, he gives to the mortgagor a renewed right to redeem, or in other words, opens the foreclosure; and consequently, upon the commencement of an action against him on the bond after foreclosure, the mortgagor may file a bill for redemption, and upon payment of the whole debt secured by the bond, he is entitled to have the estate back again, and the securities given up, and I conceive that after foreclosure, the Court will not restrain the mortgagee from suing on the bond, provided he retains the mortgaged estate in his own power, ready to be redeemed, in case the mortgagor should think fit to avail himself of the opening of the foreclosure.

The question now is, whether such an action can be sustained, after the mortgagee has sold the estate, and deprived himself of the power of restoring it to the mortgagor on full payment of the whole debt. It does not seem unreasonable, when the difference between the whole debt and the price of the estates, fairly sold, is all that is sought to be recovered in the action. But I apprehend, that the rules as to opening the foreclosure are founded on this, that in this Court, the mortgagor,

mortgagor, if he does not pay the whole debt, may lose the whole estate however valuable; but that if he does pay the whole debt, he is entitled to have the estate restored to him, and it seems to follow, that the mortgagee, having got the estate, is not to proceed against the mortgagor for full payment, if he cannot restore the estate. If this be so whilst the estate remains in his hands, how can it be altered by any separate dealing of his own with the estate, without the consent of, or any agreement with the mortgagor?

1846.  
  
 LOCKHART  
 v.  
 HARDY.

The mortgagee had, by his securities, a right to foreclose the mortgage, and if he thought the estate insufficient, a further right to proceed on his personal securities, thereby giving to the mortgagor a renewed right to redeem: but when he has so dealt with the estate, that the mortgagor cannot redeem, it appears to me, that he is not entitled to proceed, and that this Court would restrain him from proceeding on the personal securities. I think, therefore, that the exceptions to the Master's report must be allowed.

It must be owned that the case of *Tooke v. Hartley* (a), and the case of *Perry v. Barker* (b), have left this matter in great obscurity, and I find it difficult to understand the various opinions stated. I proceed upon this, that, in equity, the mortgagee is bound to restore the estate on full payment of the debt; and that having sold the estate, and thereby disabled himself from restoring it, he is not in a condition to demand payment of the whole debt, which he does, when he sues on the bond. If he sued on the covenant, he might lay his damages at the difference between the debt and the price of the estate sold. This would be obtaining

(a) 2 Bro. C. C. 125., and 2 Dick. 785.

(b) 8 Ves. 527.

1846.  
  
 LOCKHART  
 v.  
 HARDY.

obtaining full payment of the debt, taking the value of the estate as part. I incline to think that it would be altering the nature of the contract between the parties, and giving to the mortgagee the benefit of a trust for sale with a bond or covenant for the deficiency, instead of a mortgage bond or covenant. It might be reasonable to do this, and desirable to have it done, but it does not appear to me that such is the law at present.

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NOTE. — See *Schoole v. Sall*, 1 Sch. & Lef. 176.; *Stokoe v. Robson*, 3 Vcs. & B. 51.; *Smith v. Bicknell*, Ib. n.; *Shelmardine v. Harrop*, 6 Mad. 39.; *Bentinck v. Willink*, 2 Harc, 1.

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April 22. 25.  
 July 28.

### LINDGREN v. LINDGREN.

In 1843, a testatrix made several bequests to the amount of 1000*l.*, "of the stock 3 per cent. consols, then standing in her name in the books of the Bank of England."

The testatrix died in the same year, and

had not, at the date of the will, or at her death, any stock whatever standing in the Bank books. It appeared, however, from extrinsic evidence, that in 1840, she had had a sum of 1000*l.* Bank annuities standing in her name, which she sold out and lent to A. B., he paying her, down to her death, a sum equal to the dividends. It was held, that extrinsic evidence was admissible to prove how the mistake in description arose, and that the legatees were entitled to a sum equal to the value of 1000*l.* consols at her death.

The decision in *Selwood v. Mildmay* (3 Vcs. 306.) explained, and the effect of the decree therein stated.

The case of *Selwood v. Mildmay* is not overruled by the cases of *Miller v. Travers* (8 Bing. 244.) and *Doe dem. Hiscocks v. Hiscocks* (5 M. & W. 353.)

FOR some time before and up to the 13th of March 1840, the testatrix, *Susanna Stanley*, was entitled to 1000*l.* Bank 3 per cent. annuities, standing in her name in the books of the Governor and Company of the Bank of England. She had been in the habit of receiving the dividends herself. On the day mentioned, she went to the Bank and sold her stock for the sum of 903*l.* 15*s.*, for which she received a cheque appearing to be drawn by *James Wilson* on *Williams, Deacon, & Co.*

Co. She then called on the Plaintiff, who had for a long time been intimately acquainted with her and her family, told him what she had done, and requested him to take charge of the money for which she had sold her stock, and give her interest for it, to the amount of the dividends which she had previously received on the stock itself.

1846.  
LINDGREN  
v.  
LINDGREN.

The Plaintiff having consented to this, she gave him the cheque for 903*l.* 15*s.* He afterwards received the amount, and caused it to be paid to the credit of his private account with the Bank of *England*, and, thenceforward, he paid to the testatrix, by way of interest on the sum, 30*l.* a year, being the amount which she formerly received as dividends on her stock, and at the times when she had been accustomed to receive her dividends; this course of proceeding continued up to the time when the testatrix made her will.

At the date of her will, and at the time of her death, she was not possessed of or entitled to any Bank 3 per cent. annuities, or any other stock standing in her name in the books of the Governor and Company of the Bank of *England*.

She made her will on the 13th day of *May* 1843, and thereby bequeathed as follows: — “I hereby give and bequeath unto *Adolphus Lindgren* (meaning the Plaintiff), 500*l.* of the stock 3 per cent. consols now standing in my name in the books of the Bank of *England*; 100*l.* of the said 3 per cent. consols I give and bequeath to *Mary Ann Eleanor Lindgren*, wife of the said *Adolphus Lindgren*; 100*l.* of the said 3 per cent. consols I give and bequeath to *Adolphus Lindgren*, jun., the son of the aforesaid *A. Lindgren*; 100*l.* of the said 3 per cent. consols I give and bequeath to *Susanna Lindgren*, the

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daughter

CASES IN CHANCERY.

daughter of *Joseph Lindgren*; 100*l.* of the said 3 per cent. consols I give and bequeath unto *Sarah Stanley* and 100*l.* of the said 3 per cent. consols I give and bequeath unto *Emma Hoare*." She gave the rest of her property to the Defendant *Jane Lady Blizard*, whom she described as Lady *Jane Blizard*, and she appointed the Plaintiff sole executor of her will.

The testatrix died on the 18th day of *May* 1843, and her will was proved by the Plaintiff.

The testatrix having no such stock as was described in her will, nor any other stock standing in her name in the books of the Bank, a question arose what was the effect of her will purporting to give the stock, or what was meant to be given by the description of "stock" in the will.

By the decree it was, amongst other things, referred to the Master to inquire and state to the Court, whether the testatrix was, at the time of her death, or when last before that time, possessed of or entitled to any and what Bank 3 per cent. annuities, or any other and what stock standing in the books of the Governor and Company of the Bank of *England*, and the Master was at liberty to state any circumstances relating to that inquiry specially as he should think fit. The Master, upon the evidence of *Mr. Wilson* the stockbroker, and other evidence, in substance, found to the effect before stated; and the cause now came on to be heard for further directions on the report.

*Mr. Kindersley* and *Mr. Rogers*, for the Plaintiff, and *Mr. Turner* and *Mr. G. L. Russell*, for the Defendants, contended, that, under the

the circumstances, it ought to be deemed, that the testatrix, in describing the stock standing in her name, mistook the denomination of this part of her property, and meant to give legacies which ought to be satisfied out of her personal estate.

1846.  
LINDGREN  
v.  
LINDGREN.

Mr. Parry and Mr. Willcock, for Lady Blizzard, argued, that, as the testatrix had no stock, nothing could pass by her will under the name or description of stock, and that the legacy failed altogether for want of the subject or thing purported to be bequeathed. They also argued that extrinsic evidence was inadmissible.

*Selwood v. Mildmay* (a), *Wigram on Wills* (b), *Miller v. Travers* (c), *Doe d. Hiscocks v. Hiscocks* (d), *Day v. Trig* (e), *Pentecost v. Ley* (g), *Dobson v. Waterman* (h), *Evans v. Tripp* (i), *Auther v. Auther* (k), *Essington v. Vashon* (l), *Beaumont v. Fell* (m), *Le Grice v. Finch* (n), *Dingwell v. Askew* (o), *Wetherby v. Dixon*. (p)

*The MASTER of the ROLLS.*

July 28.

I cannot assume that the testatrix meant nothing by her bequest, or that she caused it to be inserted in her will in mere mockery, meaning only to delude and disappoint the objects of a pretended bounty.

It ought rather to be assumed, that she had a rational meaning; and the real question is, whether that meaning,

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| (a) 3 Ves. 306.              | (i) 6 Mad. 91.            |
| (b) Pp. 83. 103. 164. 3d ed. | (k) 13 Simons, 422.       |
| (c) 8 Bing. 244. and 1 Moore | (l) 3 Mer. 434.           |
| & Sc. 342.                   | (m) 2 P. Wms. 141.        |
| (d) 5 Mee. & W. 363.         | (n) 3 Mer. 50.            |
| (e) 1 P. Wms. 286.           | (o) 1 Cox, 427.           |
| (g) 2 Jac. & W. 207.         | (p) G. Cooper, C. C. 279. |
| (h) 3 Ves. 308.              |                           |



1846.  
LINDGREN  
v.  
LINDGREN.

ing, or the true effect of her will, can be discovered by the addition of evidence, consistently with the rules of the law.

Upon the face of the will all is clear and free from ambiguity: whatever ambiguity there may be, it is latent. No difficulty occurs, till it appears, by evidence from without, that the testatrix had not, at the date of her will, the stock which she purported to bequeath.

The authority principally relied on by the Plaintiff and the Defendants who concur with him, is the case of *Selwood v. Mildmay*. (a) In that case, the testator was possessed of certain 4 per cent. Bank annuities. He sold the whole in February 1792, and with the produce purchased Long annuities. From February 1792 (the time of the sale), at the date of his will, and up to the time of his death, he held no Bank 4 per cent. annuities. By his will, dated the 26th day of January 1796, he gave to his wife Elizabeth the interest and proceeds of 1250*l.*, which he described to be "part of his stock in the 4 per cent. annuities of the Bank of England, for and during the term of her natural life, together with such dividends as should be due upon the said 1250*l.* at the time of his decease;" and after the decease of his wife, he gave the said stock to several of his relations, in certain shares and proportions, always calling it his 4 per cent. stock; and he disposed of the residue. There being no ambiguity on the face of the will, it was held, that evidence ought to be admitted "to prove, not that there was a mistake, for that was clear, but to shew how it arose,"—"that it was clear the testator meant to give a legacy; but mistook the fund. He acted upon the idea that he had such stock."

(a) 3 Ves. 306.

**stock.**" If the testator "had had the stock at the time, it **would** have been considered that the legacy was specific, **and** that he meant that identical stock, and any act of his **destroying** that subject would be a proof of *animus revocandi*; but if it was a denomination, not the identical *corpus*, in that case, if the thing itself could not be found, and there was a mistake as to the subject out of **which** it was to arise, that would be rectified;" and it **was** declared, that the legatees of the 1250*l.* stock were entitled to be paid their legacies out of the personal estate.

1846.  
LINDGREN  
v.  
LINDGREN.

It is very necessary to observe, that in the case of *Selwood v. Mildmay*, the evidence was received, only for the purpose stated by the Master of the Rolls in his judgment, and not, as it has been erroneously supposed, for the purpose of shewing, that the testator, when he used the erroneous description of 4 per cent. stock, meant to bequeath the Long annuities, which he had purchased with the produce of the 4 per cent. stock, and that the result of the cause was, not to substitute another specific subject, in the place of a specific legacy which the will purported to bequeath:—not to substitute the Long annuities, which the testator had and did not purport to give, for the 4 per cent. Bank annuities, which he had not and did purport to give. The absence of the fund purported to be given shewing that a specific legacy was not intended, other evidence was admitted to shew how the mistake arose; and this being clearly shewn, it was held, that the legatees were entitled to payment out of the general personal estate; and the decree declared, that the legatees were entitled to be paid their legacies, to the amount of the Bank 4 per cent. annuities purported to be given, and that such legacies were to be valued according to the market price the Bank 4 per cent. annuities bore on the day of the

1846.  
LINDGREN  
v.  
LINDGREN.

the testator's death. This was the principle of the decree; but on the allegation, that the estate was not sufficient to pay the legacies in full, provision was made for their abatement and for payment of certain debts; and it was ordered, that the Long annuities should be sold, and the proceeds applied as was directed.

The circumstances of *Selwood v. Mildmay* are very like those of the case now under consideration; and I think that, if that authority has not been overruled, I ought to be governed by it.

The cases of *Miller v. Travers (a)* and *Hiscocks v. Hiscocks (b)* were cited, for the purpose of shewing that *Selwood v. Mildmay* has been overruled.

In the former (*Miller v. Travers*) the testator devised all his freehold and real estates in the county of *Limerick* and in the city of *Limerick* to trustees and their heirs. He had no real estate in the county of *Limerick*, but a small real estate in the city of *Limerick*, and considerable estates in the county of *Clare*. It was held, that parol evidence was not admissible, to shew that the testator's intention was, that his real estates in the county of *Clare* should pass. In the judgment (c) the case of *Selwood v. Mildmay* is mentioned, as if it had been held, that the Long annuities which had been purchased with the 4 per cent. stock should pass, rather than that the will should be altogether inoperative, which appears to have been a mistake. The false description was rejected, and the legacies, as I have stated, were held to be payable, not by a substitution of the Long annuities, but out of the general personal estate, of which

(a) 1 *Moore & Scott*, 342.; 8 *Bing.* 244.

(b) 5 *Mees. & Welsby*, p. 37.

(c) 1 *Moore & Scott*, 350.

which the Long annuities were part. No evidence was admitted, for the purpose of shewing that the testator meant specifically to bequeath the Long annuities, when he used the description of 4 per cent. stock. The case of *Miller v. Travers* does not, therefore, appear to me to be inconsistent with *Selwood v. Mildmay*.

1846.  
LINDGREN  
v.  
LINDGREN.

In *Hiscocks v. Hiscocks* (a), the testator devised to his son *John Hiscocks* for life, remainder to *John* his eldest son for life, remainder over. At the date of the will, *John Hiscocks*, the son, the first devisee for life, had been twice married; he had one son *Simon* by his first wife, and by his second wife an eldest son, *John*. Evidence of the instructions given by the testator for his will, and declarations of his intentions, were not admitted to prove which of the two grandsons was meant. In this case *Selwood v. Mildmay* is noticed as having been doubted in *Miller v. Travers*. The erroneous view of it which appears to have been taken is not noticed; and, when it is remarked that evidence of instructions for the will was received, it is not observed that it was only admitted as part of the evidence to shew how the mistake was made, *i. e.* for the purpose of shewing that the erroneous description was copied from a former will.

Under these circumstances, I do not think that the case of *Selwood v. Mildmay* is overruled by the cases of *Miller v. Travers* and *Hiscocks v. Hiscocks*; and, considering myself to be bound by the authority, I shall make a similar decree, declaring that the several legatees are entitled to their several legacies, to the amount of 1000*l.* Bank 3 per cent. annuities; and that such legacies are to be valued according to the market price the 3 per cent. Bank annuities bore on the day of the testatrix's death.

(a) 5 *Mee. & W.* 363.

1846.

Feb. 27.

## HEMING v. ARCHER.

An estate was sold to a party to a suit, for payment of the testator's debts, and which, by the disclaimer of a trustee, was vested in the heir *pur autre vie*, with legal remainder to the children of A. (who was living) as tenants in common. The purchase money was in Court. The case appeared not to be within the 1 W. 4. c. 47., so that no effective conveyance could be made until the death of A. Held, that the purchase money ought not to be distributed.

THIS case is reported *antè* (a), where it appears, that an estate had been sold under the decree of the Court for payment of the testator's debts; the trustee under the will having disclaimed, the estate was vested in the testator's heir at law, during the life of *Joseph Archer*, on certain trusts, with legal remainder to the children of *Joseph Archer* (who was still living and had four infant children), as tenants in common; and that an effectual conveyance of the estate could not be made to the purchaser, inasmuch as the case did not come within the twelfth section of the 1 W. 4. c. 47. enabling the tenant for life to convey the fee, and, as under the eleventh section, the infants could convey no more than the interest which each infant himself, if of full age, might have passed without orders.

The cause again came on, and a petition was presented, asking for the distribution of the purchase money which was in Court. This was objected to by the purchasers, who said, that the fund ought not to be dealt with until they had obtained valid conveyances.

Mr. *Kindersley* and Mr. *Daniel*, in support of the petition. The sale is under the Court, and the objection is one of conveyance, and not of title. The purchaser is a party to the cause, and therefore knew the title he was purchasing.

Mr.

Mr. *Turner* and Mr. *Bloxam*, for the Defendant and purchaser *Thornloe*.

1846.

HEMING  
v.  
ARCHER.

Mr. *Roupell*, Mr. *Bird*, and Mr. *Faber*, for other parties.

*The MASTER of the ROLLS.*

My impression is, that this matter can only be set right by an act of parliament. No conveyance can be made of these estates until the class of children has been determined, and that cannot be ascertained until the deaths of their parents.

The purchaser cannot be fixed with the consequence of not knowing that the act of parliament was deficient in its operation, and that no effective conveyance could be made under its provisions. Can you get over the objection?

Mr. *Kindersley* admitted he could not, and he took a reference to the Master to ascertain whether it would be for the benefit of the parties to apply for an act of parliament to enable a good title to be made.

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NOTE. — See *Noel v. Weston*, *Cooper*, 138.; *Bullock v. Bullock*, 1 *Jac. & W.* 603.; *Morris v. Clarkson*, 3 *Swan.* p. 560.; *Uvedale v. Uvedale*, 3 *Atk.* 117.; *Blatch v. Agnis*, 1 *Atk.* 420.; 2 *Sug. Vendors*, 193. (10th ed.)

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1846.

Feb. 28.

WHITTON v. FIELD.

Bequest to one for life, with remainder over to two others, with a clause of survivorship "if one or the other (of the latter) should die." Held, that the survivorship had reference to the death of the tenant for life, and not to that of the testator; and one of the remaindermen having survived the testator, but predeceased the tenant for life, the survivor was held entitled to his share by survivorship.

THE testator by his will, dated the 8th of *December* 1802, expressed himself as follows:—"I give and bequeath unto my present loving wife *Elizabeth Woollard*, all my Bank stock, to the amount of 1200*l.* stock in the four per cents in the Bank of *England*, to her for her life; and after her death, to be equally divided amongst my children, *James Woollard* and *Sarah Woollard*, by my last wife *Sarah Woollard*. But it is my will and desire, that in case of issue in this present marriage, to be equally divided amongst them, and my son and daughter *James Woollard* and *Sarah Woollard*, share and share alike. And if one or the other should die, or in case of no issue of this present marriage, then the whole to go to the survivor or survivors of them."

By a codicil, he proceeded as follows:—"And my mind and will is, that in case of the death of both my children, *James Woollard* and *Sarah Woollard*, by my late wife *Sarah Woollard*, the whole of my estates, Bank stock, goods and chattels, to be at the disposal of my present wife *Elizabeth Woollard*, if she is the survivor of my two children, *James Woollard* and *Sarah Woollard*, before-mentioned."

The testator died shortly after, having no children by his second marriage. *James Woollard* was convicted of felony and died in 1830; and the testator's widow died in 1841, leaving *Sarah Woollard*, the daughter, her surviving.

The bill was filed by *Sarah Woollard*, the testator's daughter, claiming the whole legacy.

1846.

WHITTON  
v.  
FIELD.

Mr. *Turner* and Mr. *Sheffield*, for the Plaintiff, argued, that the Plaintiff was entitled to the whole by survivorship; and that the death of the legatee, referred to in the will, meant death in the lifetime of the tenant for life.

Mr. *Wray*, for the Attorney-General, insisted, that where there was an absolute gift, with a gift over in case of the death of the legatee, the event contemplated had always been held to be death in the lifetime of the testator, *Home v. Pillans* (a); and that the Crown, in right of *James Woollard*, was entitled to a moiety of the fund.

Mr. *Randell*, for the personal representative of the testator.

The MASTER of the ROLLS said, that the survivorship must mean survivorship during the life of the tenant for life, and this construction was fortified by the subsequent clause contained in the codicil.

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Declare, that the Plaintiff *Sarah Whitton*, is absolutely entitled to the remaining moiety of the legacy of 1200*l.* stock, &c. REG. LIB. 1845 B. fo. 518.

(a) 2 *Myl. & K.* 15.



1846.

Feb. 27. 28.  
April 18.

## SEIFFERTH v. BADHAM.

Upon an ultimate limitation to a testator's next of kin, Held, that the next of kin at the testator's death, and not those at the time when such ultimate limitation took effect, were entitled.

Where, after specific limitations, a testator gives his property to his next of kin, much weight is not to be attached to that, which is supposed to be the testator's intention in favour of or against particular persons as his next of kin; for infinite variations may take place in that class between his will and his death. It is probable, that a testator, in such cases, means to provide for particular persons, and then adds that, if they fail, then the law may take its course.

**S**AMUEL JOHN MAUD, by his will, dated the 4th day of February 1820, directed his executors to place in the public funds a legacy, the interest of which he directed them to pay half yearly to his son *Samuel Diederich Maud*, during his life, who was to have liberty to dispose of the same by his will, but not in any way to dispose of the same during his life.

On the 31st of August 1832, *Samuel Diederich Maud*, by his will of that date, gave, devised, and bequeathed, to *Benjamin Seiffert* and *John Enna*, all his freehold leasehold, and personal estates not before bequeathed, of what nature soever, which he might be possessed or entitled to at the time of his death; to hold the same on certain trusts therein mentioned, and from and immediately after the decease or second marriage of his wife, to apply the income to and for the benefit, maintenance, and education of his children, in such manner as the trustees might think best; and if more than sufficient, to invest the surplus and accumulate the interest until the children should attain the age of twenty-one; "and on their, his, or her, severally attaining that age, upon trust to release, convey, transfer, and assign, his said real and personal estate, unto and equally between such children, if more than one, as tenants in common, and share and share alike; and if either of the should die before attaining the age of twenty-one years, leaving issue, then the shares of him or her dying should be released and assigned unto and in trust for such issue, but if there should be only one such child, then unto such only child, his or her heirs, executors,

utors, administrators or assigns for ever; and if all his said present or future children or child should happen to depart this life, and without leaving lawful issue them, him, or her surviving, then upon trust to release his said real estates, unto and to the use of his heir at law, and to assign his personal estate unto and equally between his next of kin, according to the Statute of Distributions."

1846.  
SEIFFERTH  
V.  
BADHAM.

The testator died on the day after the date of his will, leaving his widow (now the Defendant Mrs. Badham) and two children, *Sarah Elizabeth Maud* and *Samuel Benjamin Maud*, surviving him.

The widow married the Defendant, *James Billings Badham*, in *January* 1838. The son died on the 8th day of *July* 1841, in the ninth year of his age, and the daughter died on the following day, the 9th of *July* 1841, in the thirteenth year of her age; and, under these circumstances, the question was, who was entitled to the benefit of the trust, "to assign the testator's personal estate unto and equally between the testator's next of kin according to the Statute of Distributions."

By the decree dated the 28th of *January* 1843, it was referred to the Master to inquire who were the testator's next of kin at the time of his death, or who would have been such next of kin if the testator had died without issue, and who were the testator's next of kin at the death of the last surviving child.

The Master, by his report dated the 20th of *June* 1845, has found, that the two children of the testator were his next of kin at his death, and that the Defendants *John George Maud* and *Elizabeth Mary Smith*, the brother and sister of the testator, would have been the

1846.  
  
 SREIFFERTH  
 v.  
 BADHAM.

testator's next of kin if he had died without issue, and that they were such next of kin at the death of the testator's last surviving child.

Mr. *Tinney* and Mr. *Headlam*, for the trustees.

Mr. *Turner* and Mr. *Elmsley*, for *Badham* and wife, contended, that the rule of law was in favour of an early vesting of estates, in order that the parties intended to take the benefit of a bequest might be ascertained at the earliest period, and that it might not be left in a state of constant change and uncertainty. That, moreover, the authorities warranted the proposition, that where there was an ultimate gift to the next of kin of a testator, without any words shewing a contrary intention, the class of next of kin must be ascertained as at the death of the testator, and at the time when the will spoke; *Holloway v. Holloway* (a), *Lasbury v. Newport* (b), *Stert v. Platel* (c), *Doe v. Lawson* (d), *Smith v. Smith* (e), *Doe dem. Pilkington v. Spratt* (g); and see *Allen v. Thorp.* (h)

They also argued, that the previous provision for the children did not exclude them from taking under the ultimate limitation to the testator's next of kin; *Elmsley v. Young.* (i)

Mr. *Kindersley* and Mr. *Craig*, for the testator's brother and sister, argued, that the rule as to vesting did not apply where the prior limitations were not vested. That here, there was no gift except in the direction to transfer and assign, and that it would be a strange intention to impute to the testator, to hold that, in making a direct

(a) 5 Ves. 399.

(b) Cited from Mr. *Turner's*

MS., see *post*, p. 376.

(c) 5 Bing. N. C. 434.

(d) 3 East, 278.

(e) 12 Simons, 317.

(g) 5 B. & Adol. 731.

(h) 7 Beavan, 72.

(i) 2 Myl. & K. 780.; and see *Pearce v. Vincent*, 2 Keen, 230.

a direct provision for his children, every thing was to remain in uncertainty until they attained twenty-one; and yet that, under the ultimate limitation to his next of kin, the same children were to take vested interests immediately on the testator's death. That the class of next of kin was, therefore, to be ascertained at the time when that limitation took effect, viz. on the death of the children, and that this construction was supported by many authorities, as *Briden v. Hewlett* (a), *Butler v. Bushnell* (b), *Clapton v. Bulmer* (c), *Booth v. Vicars* (d), *Marsh v. Marsh* (e), *Jones v. Colbeck* (g); and see *Miller v. Eaton*. (h)

1846.  
SEIFFERTH  
v.  
BADHAM.

That the ultimate limitation to the next of kin being on failure of the children, the testator could not have intended them to take under that gift; *Bird v. Wood*. (i)

Mr. Turner, in reply.

*The MASTER of the ROLLS.*

I will look at the authorities cited before I decide this case.

*The MASTER of the ROLLS.*

April 18.

Mrs. Badham is the legal personal representative of the two deceased children, and she claims the property in their right, as the testator's next of kin at his death.

The

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|-----------------------------------------------|------------------------------------------------|
| (a) 2 <i>Myl. &amp; K.</i> 90.                | (e) 1 <i>B. C. C.</i> ( <i>Bel's</i> ed.) 293. |
| (b) 3 <i>Myl. &amp; K.</i> 232.               | (g) 8 <i>Ves.</i> 38.                          |
| (c) 10 <i>Simons</i> , 426. and 5 <i>Myl.</i> | (h) <i>G. Coop.</i> 272.                       |
| & <i>Cr.</i> 108.                             | (i) 2 <i>Sim. &amp; St.</i> 400.               |
| (d) 1 <i>Collyer</i> , 6.                     |                                                |

1846.  
SEIFFERTH  
v.  
BADHAM.

The brother and sister of the testator allege, that the testator having intended to give such particular interests as were provided for them by the former clauses of his will, could not intend them to take absolutely under the description of next of kin, or intend, as his next of kin, the same persons upon whose death, without issue, he directed the property to go over : he must, it is said, have meant the persons who should be his next of kin at the time when the gift over took effect.

I own that, in such a case as this, I cannot attach much weight to that which is supposed to be the testator's intention in favour of or against particular persons as his next of kin.

At the time when the will is made, it is necessarily uncertain who will be the testator's next of kin at the time of his death. If, at the date of his will, he has children who are then his next of kin, they may die before him, and give place to his brothers and sisters. If, at the date of his will, he has brothers and sisters, he may afterwards have children born, who, at the time of his death, may displace the brothers and sisters. Contingencies of this sort are infinite, and in general, it is perhaps probable that the testator, in such cases, means only to provide for those whom he does mean to benefit in the way he thinks best, and then to add, that if events defeat that particular intention, the law may take its course. It is indeed quite unnecessary to express that, because the law will make its distribution without any direction ; but it seems to me more probable, and more in conformity with the ordinary habits of men, that he should use that expression though unnecessary, than that he should have meant a benefit to the particular persons who might chance to be his next of kin. If he had intended a  
bounty

bounty to his brother and sister upon the event which he contemplated, he would probably have named them, and not have left his bounty liable to be defeated by their deaths before the event, or subject to be passed over in succession to any persons who might, from time to time, answer the description.

1846.  
SEIFFERTH  
v.  
BADHAM.

If we arrive at the conclusion that the testator, if he had been aware of the events which would happen, would not have expressed himself in the manner he did, at the time when he was of necessity ignorant what those events would be, we have made no progress towards the discovery of what his intention would have been with reference to the events.

I think that it is upon the effect of the words used by the testator that the case must be determined. That which is considered to be the true construction is, in most cases, though unfortunately not in all, considered to be the true exponent of the testator's intention. The cases of *Briden v. Hewlett* (a), and *Butler v. Bushnell* (b) were decided by the effect imputed to the particular words found in them, which were considered to be referrible to the event on which the gift over was to take effect. The words person "who should be" or "should happen to be," if they are important, are not found in the clause now under consideration. Upon the happening of the event which the testator contemplated, there is an express direction to assign to "*my next of kin according to the statute of distributions*." According to the plain construction of the language, the words mean the next of kin at the time when the will speaks, i. e. at the time of the testator's death, and there is nothing on the face of the will, shewing that the testator himself

(a) 2 *Myl. & K.* 90.

(b) 3 *Myl. & K.* 232.

1846.  
SEIFFERTH  
v.  
BADHAM.

himself put any other construction on the words, and upon the authority of *Holloway v. Holloway* (a), I think that the next of kin living at the testator's death were entitled to the ultimate gift.

I am happy to find from the report of *Urquhart v. Urquhart* (b), published since the argument, that the conclusion to which I have come is in conformity with the opinion of the Vice-Chancellor of *England*.

(a) 5 *Ves.* 399.

(b) 13 *Simons*, p. 627.

1835.  
March 31.

LASBURY v. NEWPORT. (a)

A testator gave his residuary estate to his daughter for life with remainder to her children, and in default, to his next of kin. Held that the class of next of kin was to be ascertained at the testator's death.

**W**. PEOKS, by his will, dated the 16th of February, 1834, after giving legacies and specifically bequeathing some leasehold premises and other parts of his personal estate, gave and bequeathed all other his real and personal and mixed estate and effects to trustees, upon trust to convert the same into money, and, in the first place, to raise 2000*l.*, and invest it in the name of one of the trustees and another person, upon trust for his daughter *Eliza* for life, and after her death for her children, and the issue of such as should have died in her lifetime leaving issue; and in case there should be no child of his said daughter living at his death, or they should all die without attaining a vested interest, the 2000*l.* to be considered as part of the residuary estate. And as to his residuary real and personal estate, he directed the trustees to

stand

(a) From Mr. Turner, MSS.

stand possessed thereof, upon trust for his daughter *Anna Maria* for life, and after her death for her children and their issue, as *Anna Maria* should appoint, and in default of appointment, upon trust for her children, and the issue of any who should die in her lifetime. And in case there should be no child of *Anna Maria*, or being such, they should all die without attaining a vested interest, he directed the trustees to stand seised and possessed of all his residuary real and personal estate, and monies directed to be considered as residuary personal estate, *in trust for his next of kin*, under and according to the Statute of Distributions of the estates and effects of persons dying intestate, the whole thereof being to be considered as personal, and not as real estate.

1835.  
LASBURY  
v.  
NEWPORT.

The testator died leaving his daughters *Anna Maria* and *Eliza* his only children, and sole next of kin.

*Anna Maria* afterwards died, leaving no children.

The bill was filed by *Eliza* and her husband, claiming the whole residue as the next of kin of the testator living at the death of *Anna Maria*; or one moiety of the residue as one of the next of kin of the testator, living at the death of the testator, and the other moiety as personal representative of *Anna Maria*, the other of such next of kin.

On the 27th of *November* 1834, it was referred to the Master to inquire who were the next of kin of the testator, living at the death of the testator, and at the death of *Anna Maria*.

On the 26th of *February*, 1835, the Master reported *Eliza* and *Anna Maria* to have been the next of kin of



1835.  
  
 LASBURY  
 v.  
 NEWPORT.

the testator at his death, and *Eliza* to have been the only next of kin of the testator living at the death of *Anna Maria*; and he found that *Eliza* had administered to *Anna Maria* in a provincial court.

On the 31st of *March*, 1835, the cause was heard upon further directions at the Rolls, and,

The MASTER of the ROLLS (a) was of opinion, that *Eliza* and *Anna Maria*, as the next of kin of the testator at the time of his death, took the residue under the ultimate limitation in the will.

*Holloway v. Holloway* (a), and *Briden v. Hewlett* (b) were cited, and the Master of the Rolls observed, that in *Briden v. Hewlett*, the late Master of the Rolls had proceeded upon the ground that the words in the will referred to something future; and whether that case was or not distinguishable from *Holloway v. Holloway*, it was distinguishable from the present, where there was no reference to any thing future. The decree declared the Plaintiffs, *Eliza* and her husband, entitled to the clear residue, as to one moiety in right of *Eliza*; and to the other moiety in right of *Anna Maria*.

(a) 5 *Vesey*, 399.

(b) 2 *Myl. & Keen*, 90.

(c) Sir C. C. *Pepys*.

1846.

LOCKHART v. HARDY.

June 3, 4, 6,  
July 28.

**I**N August 1831, a copyhold estate, called *Field Head*, was vested in fee by way of mortgage in *John Wastie*, the testator in the cause, for the purpose of securing to him the repayment of two considerable sums of money by *William Henry Smith*, who was entitled to the equity of redemption. Mr. *Wastie*, the mortgagee, having borrowed from *William Browne* the sum of 1600*l.*, executed to him, for the purpose of securing repayment of that sum, an assignment of the debt due to himself from *Smith*, and a surrender and release of the *Field Head* estate, which he held as security for it, subject to redemption by himself from *Browne*, and at the date of his will, Mr. *Wastie* was, as to the *Field Head*, entitled to the mortgage interest which he held under *Smith*, and to the equity of redemption of the mortgage which he had executed to *Browne*.

A testator having an estate subject to a mortgage of 4460*l.* created by himself, devised it to *A. B.* in fee, "he paying the mortgage thereon;" and he devised his residuary real and personal estates to trustees for the payment of his debts, and he gave to the mortgagee, through the medium of his executors, 2000*l.* to exonerate the estate. Held that, although, if the devise had been simply "of the estate" or "of the estate subject to the

Mr. *Wastie* was, at the same time, seised of an estate at *Buttermere* in *Wilts*, subject to a mortgage thereof to the same Mr. *Browne*, for securing to him the repayment

ment "of the estate subject to the mortgage thereon," the mortgage would have been payable out of the testator's real estate, yet that the words, "he paying the mortgage thereon," imposed a duty on the devisee, and amounted to a direction or condition that he should pay the mortgage, or take the estate subject to the burden upon it, so far as the same exceeded the 2000*l.*

An estate was mortgaged to *A.*, who sub-mortgaged it to *B.* *A.* devised the estate to *C.*, and bequeathed to *B.* the sub-mortgagee, through his executors, 1000*l.* clear in part the estate. The sub-mortgagee, after the death of the testator, closed the estate. Held, that the devisee of the estate was entitled to the 1000*l.*

1846.  
 LOCKHART  
 v.  
 HARDY.

ment of three several sums of money, amounting i  
 the whole to the sum of 4460*l.*, together with interest  
 thereon.

By his will, dated the 7th day of *August* 1835, *John*  
*Wastie* devised as follows: — “ I give to my nephew  
*James Lockhart, Esq.*, all my manor lands at *Butter*  
*mere*, in the county of *Wilts*; to hold to him and his  
 heirs for ever, he paying a mortgage thereon.”

In another part of his will, he devised as follows: —  
 “ I give and devise to *Elizabeth*, the wife of my de  
 brother, all my house and lands called *Field Head*,  
 and rights of common, now in the occupation of *Mr.*  
*Arden* as my tenant, situate, lying, and being in the  
 parish of *Hawkshead*, in the county of *Lancaster*, to  
 gether with all rights of common and turbary, but for  
 her sole and separate use only during her life. And  
 from and after her decease, I give and devise the said  
 house, with its rights and appurtenances aforesaid, to  
*Elizabeth Lockhart*, daughter of my said brother, by  
*Elizabeth* his wife, and to her heirs: and all the rest  
 and residue of my real and personal estate I give,  
 devise, and bequeath to *Mr. John Hardy* and to his  
 heirs, in trust, to give aid and payment of my debts and  
 legacies.”

By the will and a schedule thereto, he gave several  
 legacies, and, amongst them, he gave as follows: — “ To  
*Mr. Browne*, through the medium of my executors,  
 2000*l.*, they being directed therewith to exonerate my  
*Buttermere* mortgage, and to them 1000*l.*, to clear in  
 part my *Field Head* mortgage.”

The testator died in *August* 1835, a few days after  
 the date of the will.

In December 1842, the *Brownes* foreclosed the mortgage as against *Smith*, and, in 1843, they completed the foreclosure as against the representatives of *Lockhart*. (a)

1846.  
LOCKHART  
v.  
HARDY.

Under these circumstances two questions arose. First, the devisee of the *Buttermere* estate claimed a right to have the whole of the mortgage thereon, amounting to £460*l.*, paid out of the testator's general estate.

Secondly, the *Field Head* estate having, by the subsequent foreclosure, been withdrawn from the operation of the will, the devisees of that estate claimed the legacy of 1000*l.* intended for their benefit.

The case was argued by

Mr. Kindersley and Mr. Lloyd, for *James Lockhart*, who cited *Milner v. Milner* (b), *Clark v. Guise* (c), *Philipps v. Chamberlaine* (d), *Danvers v. Manning* (e), *Brackenbury v. Brackenbury* (g), *Garvey v. Hibbert* (h), to shew that the testator, having miscalculated the amount of the mortgage, this Court, in giving effect to the testator's intention, had jurisdiction to correct it.

Mr. Tinney and Mr. W. H. Clarke, for *Alice Thomas*.

Mr. Turner and Mr. Shapter, for *James Lockhart*, the elder, the heir-at-law.

Mr. Lowndes and Mr. Elmsley, for *Elizabeth Lockhart*, now Mrs. Noble.

Mr.

(a) See ante, p. 349.

(b) 1 *Ves.* sen. 106.

(c) 2 *Ves.* sen. 617.

(d) 4 *Ves.* 51

(e) 2 *Bro. C. C.* 18.

(g) 2 *Eden*, 275.

(h) 19 *Ves.* 125.

1846.

LOCKHART  
v.  
HARDY.

Mr. Roupell and Mr. Ellis, for the executors.

The MASTER of the ROLLS postponed his judgment\_\_\_\_\_

July 28.

The MASTER of the ROLLS.

The mortgage on the *Buttermere* estate and the sum ~~to~~ mortgage on the *Field Head* estate were executed, to secure the repayment of debts, which had been contracted by the testator himself; and, having regard to the true construction of the will, as affecting (if it does affect) the general liability of the testator's personal estate to pay his own debts charged on the devised estates, a question is made, to what extent the testator's general estate is liable to the payment of the mortgage on the *Buttermere* estate; and, having regard to the same question, and also to the subsequent foreclosure of the mortgage on the *Field Head* estate, a question is made, whether the 1000*l.* given to the executors, to clear in part the *Field Head* estate, is now payable.

1. It is claimed on the behalf of the devisee of the *Buttermere* estate, that the whole of the mortgage thereon, viz. the sum of 4460*l.* and interest, ought to be paid out of the testator's general estate.

The claim would have been good, if the devise had been simply of the *Buttermere* estate, or of the *Buttermere* estate subject to the mortgage thereon. (a)

But

(a) See *Serle v. St. Eloy*, 2 P. 3 Myl. & Cr. 763., and 2 *Jarman* Wms. 386.; *Bickham v. Cruttwell*, on Wills, 553.

But the words "he paying a mortgage thereon" appear to me to impose a duty on the devisee, and to amount to a direction or condition that he shall pay the mortgage, or take the estate with the burden upon it. The words "he paying" cannot, I think, be considered as merely descriptive of the testator's interest in the estate; and, by using those words as he has done, I think that the testator has shewn an intention that the debt should be paid by the devisee, and not out of his own personal estate.

1846.  
  
 LOCKHART  
 v.  
 HARDY.

By the legacy given in the schedule, I think the testator has qualified or limited the extent of the effect of the words used in the devise, and has directed the burden, which he had before directed to be wholly borne by the devisee, to be partly borne by his own estate; and, giving only 2000*l.* to exonerate a mortgage of much larger amount, it appears to me, that he cannot be considered to have meant any sum greater than the amount of the legacy to be applied for that purpose; and that this legacy, although, in the form in which it is given, it qualifies the direction or condition which accompanies the devise, is consistent with the conclusion, that the general estate was not intended to bear the whole burden.

2. As to the legacy of 1000*l.*, given in part to clear the *Field Head* mortgage, I think that, if the devise had taken effect, the legacy ought to have been applied for the purpose intended. If it had been so applied, it would have enured to the benefit of the devisee,—to that extent, and in that manner, (independently of the general rule respecting the application of the testator's personal estate in payment of a mortgage, charged on a devised estate), there was a manifest intention to benefit the devisees.

In

1846.  
LOCKHART  
v.  
HARDY.

In consequence of the subsequent foreclosure of the mortgage made by the testator on the *Field Head* estate, the estate was withdrawn from the operation of the will, and the devise could not take effect. I do not think that the devisee is, for that reason, to be deprived of that part of the benefit which the testator intended for him, and which is still capable of being afforded, though not precisely in the manner which was contemplated.

Considering the rights of the devisees at the time of the testator's death, and that, before the foreclosure they were entitled to have the 1000*l.* applied to clear the mortgage in part, or to assist them in redeeming it. I think that they had such a personal interest in the legacy as could not be extinguished by the foreclosure; and that, subject to any interest of the devisee for life, the fund in question must be transferred to the trustee of Mrs. *Noble's* settlement.

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# REPORTS

OF

## CASES

ARGUED AND DETERMINED

1846.

IN

### THE ROLLS COURT

STANES v. PARKER.

March 23.

**WILLIAM CLACHAR** devised estates to trustees, on trust for the separate use of his daughter *Sarah Stanes*, and after her death on trust to sell and divide the produce for her children.

The testator died in 1813, and one of the executors and trustees having renounced, the Defendant *Parker*, solicitor who had acted for the testator in his lifetime, in *February* 1814, appointed a trustee in his stead. *William Stanes* died in 1834, leaving three children, viz. two Plaintiffs and *Sarah J. Stanes*, one of the Defendants. The estates were sold by the Defendant

A trustee, who was a solicitor, came to a final settlement of accounts with his *cestuis que trust*, and thereupon a general release was executed. In the accounts, the trustee had taken credit for bills of costs for professional services, to which, under the general

release, *Parker*, was not entitled. The *cestuis que trust* were assisted on the occasion by an independent solicitor, who perused the bills, and settled and attested the release. Held, under the circumstances, that the trustee was entitled to the benefit of the release.

IX.

C c



1846.

STANES

v.

PARKER.

*Parker*, and the produce divided among the three children.

The affairs of the trust were finally wound up, the accounts were settled, and, in November 1837, a general release was executed by the Plaintiffs to *Parker*. In the accounts, the Plaintiffs were charged by the Defendant *Parker* with two bills of costs amounting to 554*l.* and 512*l.* for professional business transacted by the Defendant while trustee. This bill, filed in November 1839, sought, notwithstanding the settlement of the accounts and release, to have the accounts opened, and the professional charges of the Defendant, beyond costs out of pocket, disallowed, but all the relief, except the disallowance, was abandoned at the hearing.

The circumstances attending the release and settlement of the accounts were admitted to be, substantially, as follows:—In October 1837, the Defendant *Parker* claimed the two bills of costs for business done in relation to the testator's estate, and on the 20th of that month, he delivered the first bill, amounting to 554*l.*, to Messrs. *Pattison & Cutts* (the Plaintiffs' solicitors), for their perusal on behalf of the Plaintiffs. Messrs. *Pattison & Cutts* perused such bill (after the same had been by them submitted to and perused by the Plaintiffs), and finally sanctioned the payment of the same.

The second bill of costs was seen, from time to time, by Mr. *Cutts*, as *Parker* was making it out; and Mr. *Cutts*, on the morning of the 13th of November 1837, came to *Parker's* office, and took away with him a copy of such bill; but no copy had, prior to that morning, been delivered.

*Parker*

*Parker* had insisted upon the Plaintiffs acknowledging his trust accounts to be correct, and executing to him a general release, as such trustee, in full of all demands, before he would pay over to them the sums which constituted their shares of the trust funds in his hands (a full, complete, and final payment and settlement, being in the contemplation of all parties). He accordingly prepared a draft general release, which was delivered to Messrs. *Pattison & Cutts* on the 27th of *October*, and was perused and approved of by them on behalf of the Plaintiffs, and returned for engrossment; and every thing appearing ready for a final settlement, the 13th day of *November* 1837 was appointed for that purpose.

1846.  
STANES  
v.  
PARKER.

In the early part of the morning of that day, Mr. *Cutts* attended at *Parker's* office, and inspected and examined all the accounts and the second bill of costs. Mr. *Cutts* took all the accounts and the bills to his clients, who were at the *Black Boy Inn*, a very short distance from *Parker's* office, and they were perused by the Plaintiffs, and explained to them by Mr. *Cutts*, and delivered back approved to the Defendant *Parker*.

The Plaintiffs and the Defendant *Sarah J. Stanes* signed their approval to the general account, and executed to the Defendant a release, dated the 13th of *November* 1837, from all claims &c. in respect of the trust matters, which release was attested by Mr. *Cutts*, their solicitor.

This bill was filed in *November* 1839 for the purpose above stated, and the Defendant *Parker*, by his answer, after detailing the circumstances under which the release had been executed, claimed the benefit of the settled account and release, in bar to this suit. He

1846.

STANES

v.

PARKER.

also claimed the benefit of the several recitals contained in the release.

The cause now came on for hearing, and the question was as to the professional charges, it having been agreed that the remainder of the bill should be dismissed with costs.

Mr. Kindersley and Mr. Bagshawe for the Plaintiff argued, that it had been clearly settled, that a trustee, being a solicitor, could only charge his *cestui que trust* with his costs out of pocket, for business done in the matters of the trust; *Moore v. Frowd*. (a) That their non-liability to pay the costs never having been brought to the attention of the *cestuis que trust*, the release could not avail the Defendant, or be set up in bar of the Plaintiffs' claim to be reimbursed monies paid, or allowed to be retained by the trustee, under a mistaken notion of their liability.

Mr. Turner and Mr. Chandless, for the Defendant, were not called on by the Court.

Mr. Smith and Mr. Paynter appeared for other parties.

### The

(a) 3 *Myl. & Cr.* 45. The other authorities on the point are, *Robinson v. Pett*, 3 *P. Williams*, 249.; *Hovey v. Blakeman*, 4 *Ves.* 596.; *New v. Jones*, 9 *Byth.* (1st ed.) 338.; *Willis v. Kibble*, 1 *Beavan*, 559.; *Collins v. Carey*, 2 *Beavan*, 128.; *Smith v. Langford*, 2 *Beavan*, 362.; *In re Sherwood*, 3 *Beavan*, 338.; *Bainbrigge v. Blair*, 8 *Beavan*, 588.; *Carmichael v. Wilson*, 2 *Molloy*, 537.; *Fraser v. Palmer*, 4 *Y. & Col. (Ex.)* 515.; *Burge v. Brutton*, 2 *Hare*, 373.; *York v. Brown*, before V.C. K. Bruce, 12th June 1844.; and see *Todd v. Wilson*, *post*, 486.

*The MASTER of the ROLLS.*

1846.

STANES  
v.  
PARKER.

The safety of the public has been justly thought to require the rule now clearly established, that, although a trustee, being a solicitor, may appoint another solicitor to execute the professional business relating to the trust, yet, if he does it himself, he shall not be allowed to charge for his professional services. This may sometimes occasion a hardship, but the rule has been established for the benefit of *cestuis que trust*, because it is thought unsafe to sanction any such allowance, and thereby tempt the solicitor to create unnecessary business for his own profit.

Mr. Parker delivered two bills containing many items, which, if they had been submitted to taxation, would have been disallowed. The Plaintiffs and their sister appear to have been interested in the estate, and the two Plaintiffs, at the time when the bills were settled and the release executed, employed a solicitor of their own, who should have known the rule, that a solicitor, who is also a trustee, is not entitled to charge for professional business, even though it might appear that he had spent much time in the business, and had rendered essential services for which he might have charged, if he had not been a trustee.

The first bill was delivered to the Plaintiffs' solicitor on the 20th of *October* 1837, and it remained in his hands until the 13th of *November*. The second bill was not delivered under circumstances so favourable to the solicitor. The Defendant, it appears, was a long time in completing that bill, and it was not finally made out, or in the possession of Mr. Cutts until the 13th of *November*; but he then received it and carried it away with him to his clients, who were

1846.

STANES  
v.  
PARKER.

in the neighbourhood and consulted him on the subject and no objection was made to the items now complained of. That is not all. The parties had been long preparing for a final settlement. Mr. Parker had prepared the draft release, and sent a copy of it so long back as the 27th of *October*, so that from the 27th of *October* to the 13th of *November* the Plaintiffs had notice of what they were required to do on final settlement. The Defendant had given full information as to the nature of the charges in the first bill, and as to the release expected; so that in *October* the Plaintiffs must have come prepared to give their attention to the subject. The second bill had been inspected by *Cutts* as it was making out; it was afterwards examined by *Cutts* with his clients, apart from *Parker*, and therefore no notion of surprise, pressure, or any thing of the sort, can arise. Having all this information and professional assistance, they executed this general release, and there appears to me no reason for not giving it full operation.

If the Plaintiffs had charged and proved that *Parker* knew the law, according to his duty, and that *Cutts* was ignorant of the law which he ought to have known according to his duty, and that *Parker* had fraudulently taken advantage of his own knowledge and of his adversary's ignorance, this release might then have been held to be inoperative. Here nothing of the sort is even alleged.

On the whole of this case, I do not find any ground for setting aside the release. I think that the Plaintiffs are bound by it, and that the Defendant is entitled to the benefit of it. The bill must be dismissed with costs.

1846.

**GRAY v. The LIVERPOOL and BURY Railway Company.** *March 11.*  
*14. 25. 28.*

**T**HIS was a motion for an injunction under the following circumstances : —

In *December* 1844, a scheme was set on foot for obtaining an act of parliament for the formation of a railway from *Bolton to Liverpool*.

The Plaintiffs were owners of certain lands, and extensive cotton mills and conveniences erected thereon at *Darcy Lever*, in the line of the proposed railway; and, according to the original plan, the railway would pass directly through and over several of the Plaintiffs' houses and buildings, and the gort and feeder by which their mills were supplied with water. The Plaintiffs dissented, and opposed the application for the act of parliament before the committee of the House of Commons. After some attempts at negotiation, it was ultimately agreed, that a clause should be introduced into the bill for the Plaintiffs' protection, and the Plaintiffs thereupon withdrew their opposition, and the bill passed.

The clause, which formed the ninety-second section, was as follows : —

“ And whereas *John Gray* and *William Gray* are the owners and occupiers of certain mills, lands, and buildings,

proposed line, such consent ought to be obtained by the company before they proceed in the undertaking.

Whether, where it is evident that the line of a railway cannot be fully completed, the company have a right, compulsorily, to take any part of the property in the proposed line. *Quære.*

It is on the ground of a general public good, that the legislature grants to railway companies the compulsory powers of taking the property of individuals.

In questions between companies and individuals, whose property the former seek to take under compulsory clauses in their acts, the Court does not strain the construction of the act in favour of the former.

When the power of fully completing a railway, according to the intention of the legislature, depends on the voluntary consent of individuals having property on the

1846.  
 GRAY  
 v.  
 The  
 LIVERPOOL  
 and BURY  
 Railway Com-  
 pany.

ings, situate at *Darcy Lever*, through which the line the railway, as delineated on the plans and sections before referred to, passes; be it enacted, that it shall not be lawful for the said company, without the consent of the said *John Gray* and *William Gray*, or the owner or owners for the time being of the said mills, lands, and buildings, to construct the said railway nearer to the same mills, lands, and buildings, or any of them, than the south east end of *Lever Bridge*, delineated on the said plans and therein numbered one." (a)

The ninety-third section provided as follows: — "And be it enacted, that the said company shall not, in or during the construction or progress of the said railway or works, divert, obstruct, or in any way injure the works of the said *John Gray* and *William Gray*, connected with their works at *Darcy Lever*, and in the plan and book of reference of the said company referred to, under the penalty of 50*l.* for each and every day of the occurrence of such diversion, obstruction, or injury," to be paid to them above the damage actually sustained, to be recovered by action at law; nor shall the company, during the construction of the said railway or works, "obstruct the carrying on of the said works of the said *John Gray* and *William Gray*, under the like penalty," &c.

The Defendants conceived, that, according to the intention of the ninety-second section, they were authorized to construct the railway without the consent of the Plaintiffs, upon any line not nearer on the south side to the line originally laid down, than a line parallel thereto drawn through the southernmost part of the east end of *Lever Bridge*; and they accordingly gave the ordinary notices, and were proceeding, without the Plaintiffs

(a) 8 & 9 Vict. c. clxvi. s. 92.

tiffs' consent, to construct their railway in a line parallel to the original line at the distance named, but passing through some of the lands belonging to the Plaintiffs, which, however, were separated from the lands on which their works were situated by a public road.

1846.  
  
 GRAY  
 v.  
 The  
 LIVERPOOL  
 and BURY  
 Railway Com-  
 pany.

The Plaintiffs thereupon filed this bill, and moved for an injunction to restrain the Defendants from constructing the railway "nearer to the mills, lands, and buildings of the said Plaintiffs at *Darcy Lever*, or any of them, than the south-east end of *Lever Bridge*," and from entering, &c. upon the Plaintiffs' said lands and property nearer than the south-east end of *Lever Bridge*, without the Plaintiffs' consent.

Mr. Kindersley, Mr. Turner, and Mr. Bacon, in support of the motion.

They cited *Webb v. The Manchester and Leeds Railway Company* (a), and *Blakemore v. The Glamorganshire Canal Company*. (b)

The Solicitor-General (Sir F. Kelly), Mr. Rolt, and Mr. R. Palmer, *contra*, raised the several points stated in the judgment.

Mr. Kindersley, in reply.

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The MASTER of the ROLLS.

March 28.

I think it is exceedingly to be regretted, that the parties here have not been able to come to some sort of arrangement or compromise, so as to stop this litigation, and prevent the necessity of any order. However, as they

(a) 4 *Myl. & Cr.* 116.

(b) 1 *Myl. & K.* 154.



1846.  
 GRAY  
 v.  
 The  
 LIVERPOOL  
 and BURY  
 Railway Com-  
 pany.

they have been so unfortunate as not to be able to do so, it is for me to give the best opinion that I can on the case.

In cases like the present, it is always to be borne in mind, that these acts of parliament, are acts of sovereign and imperial power, operating in the most harsh shape in which that power can be applied in civil matters. Solicited, as they are, by individuals, for the purpose of private speculation and individual benefit, they are not passed by the legislature, otherwise than on the notion that they contribute to the general public good so materially, as to make it even for the general benefit, to violate the rights of property of private individuals. For the sake of that which is supposed to be the public good, (and, upon the consideration of a particular act which has passed, we are bound to consider it for the public good on the whole,) it is thought fit to take away from private individuals that which is undoubtedly their own absolute property; and that, too, at a price which is to be fixed by authority (if need be) without any voice of their own. Whoever considers the effect of this, must see the consequences which frequently do happen to individuals; property to which they have attached their whole fortunes and interests, may be taken from them by an absolute exercise of imperial power, and their whole circumstances and situation in life may be entirely altered for a sum of money to be fixed by somebody else. This Court, I believe, has always regarded these matters in this light, when again and again (though not so frequently as of late years) these matters have been under its consideration.

At one time, the doctrine held in this Court was, that unless those who were enabled to carry on such a speculation, could satisfactorily shew that they had the means

means of completing the entire undertaking (the whole and not a part of which, was alleged to be for the public good), they should not be allowed to invade any man's property in the execution of a part only of their undertaking. (a)

1846.  
 GRAY  
 v.  
 The  
 LIVERPOOL  
 and BURY  
 Railway Com-  
 pany.

The hardship imposed on individuals I think, and I am glad to think, has of late years been subject to a more anxious consideration than it used to be. Probably the frequency of applications for such acts of parliament, and the vast extent of the works have occasioned that particular consideration. Where the property of a party does not possess any peculiar value, parliament will apply that which has become almost a general rule in such cases; but if the property does possess some peculiar value, if the projected public work is to pass over a portion of property more valued than any other, or invades a right to which the owner may be considered to be more peculiarly attached, in such cases parliament will facilitate and encourage agreements between the parties possessing such property and those desiring to take it away, and in cases in which the terms of such agreements cannot be at once settled, will refer the parties to an agreement to be subsequently entered into between themselves; and so it appears to have been in this particular case.

In this case it appears, that in the course of last year, the promoters of this railway from *Liverpool* to *Wigan*, *Bolton*, and *Bury*, were soliciting an act of parliament to construct a railway, which passed through property belonging to and occupied by the Plaintiffs in this cause. The Plaintiffs, conceiving that this property was of peculiar

(a) See Lord Eldon's observations in *Blakemore v. The Glamorganshire Canal Navigation*, 1 Myl. & K. 164.

1846.  
 GRAY  
 v.  
 The  
 LIVERPOOL  
 and BURY  
 Railway Com-  
 pany.

culiar value, not to be determined according to the general rules adopted in ordinary cases, opposed the bill. It appears from the evidence, that the opposition was successful, and that unless some arrangement could be made, and some agreement entered into between them, the bill would not have passed subjecting them to the ordinary rules established in such cases. In that state of things, an attempt was made to obtain a compromise and agreement. Most unhappily, I think, for the interest of all persons concerned in this matter, that was not successful; but it is plain, that both parties after the communications, believed they could come to an agreement. If they had not had this belief, Messrs. Gray, the Plaintiffs, would not have insisted on these clauses, neither would the company have agreed to place themselves in their power. However, after having failed to come to an agreement by consent, this clause was agreed to.

Now, the clause is this: "Whereas *John Gray and William Gray* are the owners and occupiers of certain mills, lands, and buildings, situate at *Darcy Lever*, through which the line of the railway, as delineated on the plans and sections before referred to, passes; be it enacted, that it shall not be lawful for the said company, without the consent of the said *John Gray and William Gray*, or the owner or owners for the time being of the said mills, lands, and buildings, to construct the said railway nearer to the same mills, lands, and buildings, or any of them, than the south-east end of *Lever Bridge*, delineated on the said plans, and there in numbered one." They are not to construct the railway nearer to the "same mills, lands, and buildings," not nearer to any part specified, but not nearer "to the mills, lands, and buildings" than the south-east end of *Lever*

*Lever Bridge.* Now, there is a collective description in the words "mills, lands, and buildings:" they include the whole and every part of those premises of which *John Gray* and *William Gray* were the owners and occupiers. They were the owners and occupiers of the whole which is delineated on the map, and the railway is not to be constructed nearer than the south-east end of the bridge, which bridge crosses the river *Tonge*, and is immediately continued by the road, which has, on both sides, a portion of those lands. The words in themselves do not seem to me to be attended with any difficulty. They mean "you shall not come nearer to my estate than the bridge."

1846.  
GRAY  
v.  
The  
LIVERPOOL  
and BURY  
Railway Com-  
pany.

It has been argued, on behalf of the Defendants, that that cannot be the construction; and the only question is, whether there is any thing to overcome that which is the plain and natural construction of these words. In the first place it is said, that this construction would make the construction of the railway dependent altogether on the will of Messrs. *Gray*. That does not in itself seem very absurd, though it is said to be so, because, it is argued, the whole scope of the act clearly manifests, that, at all events, there was to be a railway constructed. How is that? A railway is to be constructed to be sure, but subject to the provisions in the act, and this is one; the railway is not, therefore, to be constructed at all events, but only subject to the provisions of the act, including, among others, this clause, and not otherwise. That argument, therefore, does not go far.

Then, it is said, you must give a restricted meaning to the words "mills, lands, and buildings," and that they must mean either those mills, lands, and buildings which are employed in the factory, and which

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give

1846.  
 GRAY  
 v.  
 The  
 LIVERPOOL  
 and BURY  
 Railway Com-  
 pany.

give the particular special value to the property, or those strictly cut by the line of railway as originally designed, or they must have some other restricted meaning to be discovered in some other way. A very ingenious argument has been used on that subject, but I must say I do not find any thing to convince me that this was the intention of both parties. As to the arguments used about the legislature intending this or that, I think nothing of them. The legislature had no object but to provide that there should be an agreement between the parties, and that the railway should be constructed, provided this agreement should be made.

Another argument urged with a great deal of ingenuity and plausibility is, that, supposing there was to be a railway, the intention was to keep the railway as far off the original projected line as the south-east end of the bridge, and that at that distance it might be constructed on a line parallel to the original line. There is a great deal of plausibility in this, but there are no words in this clause of the act which in the least degree approach to an indication of any such a thing being meant.

If any one of these constructions had been meant, I believe it might have been clearly expressed in as many words as have been employed in this clause. If any one of these propositions were the real meaning of these parties, why was it not stated? There would have been no difficulty in expressing any one of them. If it was not the real meaning of both sides, why are we to strain the construction of the words found in the act?

With respect to these acts of parliament, the opinion of Lord Cottenham on this subject has been stated to me, and coming from him, I must say I consider it has peculiar

liar weight, because, in the numerous cases which at one time came before him from every branch of the Court, he has never shewn the least disposition to press any harsh construction against railway companies ; on the contrary, he has been most anxious to uphold them, sometimes in cases of considerable difficulty, in the legal exercise of those powers with which parliament has invested them. But, he says, " If parliament has authorised the thing to be done by agreement, it is nonsense for you to come and ask the Court to put a liberal construction upon it. I am dealing between two parties whose rights are to be determined and effected by agreement entered into between themselves. I must not look at the consequence of giving operation and effect to that which I think agreed on between these parties. They have agreed, and the legislature have allowed them to agree, on the terms on which they gave up their land."

1846.  
  
 GRAY  
 v.  
 The  
 LIVERPOOL  
 and BURY  
 Railway Com-  
 pany.

So here, the terms demanded may be very exorbitant, and it may be, that very fair and just terms have been refused. I know nothing of that; but taking that clause to be the expression of an agreement, I think the agreement is, that you are not to enter upon these lands, that is, you are not to enter upon these lands or come nearer them than the end of the bridge. If that be the meaning, it can hardly be altered without parliament; for I do not see how I am to make an agreement, or, by putting a liberal, or what in this case would be a strained and forced construction on this act of parliament, compel these persons to give up their land, which they have not agreed to give up, for the price that has been offered to them.

I am surprised at the course which the parties have taken; I regret it, for I cannot help thinking, that if there had been a communication immediately after the  
 act



1846.  
GRAY  
v.  
The  
LIVERPOOL  
and BURY  
Railway Com-  
pany. 4

act of parliament passed, instead of the general notice given by the Company in the month of *August*, the parties would have come to some agreement. That was not done, but a common notice was given. It excited alarm; the alarm was appeased to some extent by the answer received to the letter sent in consequence; but afterwards the Plaintiffs' rights were entirely disregarded.

It is said, and I believe with perfect accuracy, that the Plaintiffs possess the whole tract of land between the utmost bounds of deviation allowed by the act, and that the Plaintiffs by refusing to agree, or by the parties being unable to come to an agreement, the railway is stopped altogether. If that be so, was it not known to the parties at the time? Had they not the maps, was not every thing ascertained, and did they not see at that time, that if there was no agreement, there could be no railway?

I am not at all clear that this difficulty may not lead to a much more serious inconvenience than has yet been apprehended, and it was with that view that I adverted to the question arising on that which was the doctrine of the Court at one time, and which, for any thing I know, may be applied again (*a*), *viz.*: that if it be shewn that the plan marked out by parliament cannot be executed, have the company a right to proceed at all with the railway? If it be clear that parliament intended a communication by railway from *Liverpool* to *Bury*, and if it be also perfectly clear, that the line will be cut off and that the whole of it cannot be effected, has this Company a right, under such circumstances, to persist in their undertaking and invade the property of individuals, when they are only authorised to proceed

(a) *Antè*, p. 394.

ceed on the principle that they are providing for the public benefit, by securing the whole line of communication? I state this to shew how strongly I feel, that as to all those things with respect to which they were dependent on individual agreement; it was the duty of the company to settle those agreements before they began to cut anywhere. It would be a strong measure indeed, to allow men's properties to be summarily taken from them on the notion of the general benefit, when the parties taking it have not done those things which are incumbent on them to secure their capacity and ability to complete the whole undertaking.

I am of opinion, on the construction of this clause, that the company have not a right to make a railway through these lands, until they have entered into an agreement with the Plaintiffs, and I shall therefore grant this injunction.

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Upon appeal, Lord *Lyndhurst*, on the 2d of May 1846, directed the question as to the legal rights of the parties to be tried at law.

1846.  
  
 GRAY  
 v.  
 The  
 LIVERPOOL  
 and BURY  
 Railway Com-  
 pany.



1846.

Jan. 19.

*In re FOLJAMBE.*

A solicitor, on payment of his costs, undertook to deliver his bill, but he neglected.

On a petition presented more than twelve months after, the Court, under its general jurisdiction, ordered the delivery with costs.

**I**N a cause of *Neale v. Hodgson*, it was ordered that the Defendants should transfer certain monies, &c., on payment of their costs.

The Plaintiff, on the 21st of *June* 1844, paid to Messrs. *Foljambe*, the solicitors of the Defendants, the amount claimed by them for their costs. At the time of the payment, Messrs. *Foljambe* stated, that the bills of costs were only in rough draft and had not been fair copied; but that if the Plaintiff would pay the amount thereof, they, Messrs. *Foljambe*, would send the bills of costs within a few days.

Repeated applications having been made for the bills without success, this petition was presented by Mr. *Neale*, praying for an order for their delivery.

Mr. *W. M. James* in support of the application.

Mr. *Daniel*, *contra*, objected that the Petitioner in this case was not the client, and that if he stood in that position, the application came too late, not having been made within twelve months after the payment. (a)

*The MASTER of the ROLLS.*

This is not an application for the taxation of the bill but for an order that the Respondents may be ordered

(a) 6 & 7 Vict. c. 73. ss. 37. & 41.

to deliver the bills of costs according to their undertaking. They are officers of the Court, and are bound to do what is right. The Petitioner, who has paid the bills, ought to have had them delivered to him long ago, to enable him to know what he has paid, and for what.

1846.  
In re  
FOLJAMBE.

The Respondents, it appears, procured payment, on their undertaking to deliver the bills within a few days; they were bound to fulfil their part of the agreement without delay, but they have omitted to do so.

I have jurisdiction to order the delivery, which I will certainly exercise, and, taking the whole matter into consideration, the Respondents must pay the costs of the petition.

GIBSON v. NICOL.

GIBSON v. ALSAGER.

GIBSON v. STURGIS.

Feb. 16, 17, 19.  
March 3.

THE Defendant *Nicol*, being the owner of the ship "Triton," made five several mortgages of it and its freight. The first and third were vested in *Smith*, the second was vested in the Plaintiff *Gibson*, and the fifth was made to *Dobson*.

In a suit by a second mortgagee to foreclose and redeem, certain Defendants, including the provisional assignee of the insolvent mortgagor, disclaimed. They were, however, brought to a

On the 2nd of *March* 1843, *Gibson*, the second mortgagee, filed this bill against *Smith* and the subsequent

being, and it then appearing that there was insufficient to pay the first mortgage, Plaintiff declined taking the account. The bill was dismissed as against the disclaiming Defendants, without costs, and the first mortgagee alone was held entitled to his costs.

1846.

GIBSON

v.

NICOL.

quent incumbrancers and against the mortgagor, praying redemption against *Smith*, and a foreclosure as to the rest.

In 1844, the mortgagor became insolvent, and his estate became vested in Mr. *Sturgis*, the provisional assignee, who was brought before the Court. *Sturgis*, by his answer, stated, that he did not and never did claim any interest in the ship, &c. and he absolutely disclaimed.

It appeared, also, that on the day before the filing of the bill, *Dobson*, the fifth mortgagee, had assigned his mortgage to *Dixon* and *Ponter* for the benefit of his creditors, but on the 22nd of *December* following, he became bankrupt. His assignees stated there were no assets of the bankrupt, and submitted to act as the Court might direct, and *Dixon* and *Ponter* by their answer "did thereby disclaim" all interest, &c.

The cause coming on, a discussion as to priority arose, but which had not been raised by the pleadings, and the Court decided that it could not now be raised. It then appeared that the proceeds of the ship and freight were insufficient to pay the first mortgagee. The question of costs was then discussed.

Mr. *Turner* and Mr. *Batten* for the Plaintiff. The presence of the subsequent mortgagees was indispensable, and as, upon the investigation, it turns out that the mortgage security is deficient, they can have no costs. After the disclaimer, the Plaintiff could only have dismissed upon giving them the costs, which they were not entitled to; they were, therefore, of necessity, brought to a hearing. The assignees stand in the same situation in that respect as any other parties. *Appleby v. Duke (a)*; *Cash v. Belcher (b)*; *Clarke v. Wilmot (c)*;

*Tipping*

(a) 1 *Hare*, 303. & 1. *Phil.*  
272.

(b) 1 *Hare*, 310.  
(c) 1 *Phil.* 276.

*Tipping v. Power* (a). A party disclaiming who had an interest at the institution of the suit is not entitled to costs.

1846.

GIBSON  
v.  
NICOL.

Mr. *Follett* for *Sturgis*. This Defendant having properly disclaimed, ought not to have been brought to a hearing, and is therefore entitled to his costs; *Silcock v. Roynon* (b). The ground on which costs were not given in *Appleby v. Duke* was, because the provisional assignee had not disclaimed, as he has now done.

Mr. *Roupell* and Mr. *Rolt* for *Smith*.

Mr. *E. Webster*, Mr. *Calvert*, and Mr. *Attwood* for other parties.

Mr. *Batten* in reply.

The MASTER of the ROLLS.

It having been stated to me that this point is now under the consideration of the Vice-Chancellor *Wigram* (c), I will have some communication with him, before I decide this point. The Plaintiff must state to me the terms of the decree he asks.

Mr. *Batten* stated, that the Plaintiff, considering the value of the mortgaged security, declined asking for any accounts.

Feb. 19.

The MASTER of the ROLLS.

The bill will then be dismissed.

The

(a) 1 *Hare*, 405.

*Hare*, 93., and *Gabriel v. Sturgis*,

(b) 2 *Y. & C. (C. C.)* 376.

*ib.* 97.

(c) In *Grigg v. Sturgis*, 5

1846.

GIBSON  
v.  
NICOL.  
March 3.

The case was mentioned again as to costs, when,

Mr. *E. Webster*, for *Dixon* and *Ponter*, said :—Th ~~ese~~  
Defendants having disclaimed, the Plaintiff ought ~~not~~  
(as he has done) to have filed a replication ; ~~M~~*it-*  
*ford*. (a) The bill should therefore be dismissed w—ith  
costs as against them, *Beames on Costs* (b), and ~~W~~*il-*  
*liams v. Long fellow* (c), where it is said :—“ If a ~~D~~e-  
fendant disclaim generally, and the Plaintiff rep~~lies~~  
to her answer, and serves her with a subpoena to rej~~oin~~  
in, she is entitled to have costs against him for the v~~ex~~-  
ation.”

Mr. *Calvert* argued, that the Plaintiff's asking no re~~lief~~  
was equivalent to dismissing his own bill, which co~~uld~~  
never be done except with costs. *Fidelle v. Evans* (c).

*The MASTER of the ROLLS.*

The Plaintiff does not think fit to ask for the accou~~nts~~,  
and I must therefore dismiss the bill.

As to the costs, the parties are proceeding under a  
mistake, forgetting altogether that this is a case of a  
mortgage security. A gentleman mortgages a ship far  
beyond its value, and the second mortgagee, think~~ing~~  
fit to know how the matter stands and to have an ac-  
count, files a bill for that purpose against the mortga~~g~~or  
and the other persons claiming under him.

In the investigation which has taken place, it tu~~rn~~s  
out that there is not sufficient to pay any of the mo~~rt~~-  
gagees except the first.

I am

(a) 319. (4th ed.)

(b) 233. (4th ed.)

(c) 3 *Atkins*, 581.

(d) 1 *Cox*, 27. And see *A* ~~son~~.

1 *Ves. jun.* 140., and *Dixon v.*  
*Parks*, *ib.* 402.

I am of opinion, under the circumstances of the case, that the bill must be dismissed without costs, as against all the parties except the first mortgagee, and with costs as against him.

1846.

GIBSON  
v.  
NICOL.

WASNEY v. TEMPEST.

March 27.

**T**HIS was a motion for the production of documents. The case alleged was of the following nature: — In 1804, the Plaintiff's father was seised in fee of an estate *G.*, and *Stephen Tempest*, the father of the Defendant, "assumed to be seised of or entitled to a farm called *B. &c.*, for an estate of inheritance in fee simple or for some other estate." These estates were separated by a stream, and were traversed by a public highway.

In 1804, by agreement between these parties, the road was altered, and the stream straightened; and the bill alleged, that as an equivalent for the damage done to the *G.* estate, a small piece of the land marked *C.*, gained by straightening the stream, was thrown into the Plaintiff's father's estate, and was afterwards enjoyed by him, with the acquiescence and concurrence of the Defendant's father and of the Defendant; but no conveyance thereof was ever executed.

The Plaintiff became entitled to his father's estate, and the bill alleged that the Defendant's father died in 1824, and, on his decease, "the Defendant, by some right or title derived from his father or from some other source, and by means of the same instruments as

On a bill to enforce an arrangement respecting land entered into by the Defendant's father in his life, the Defendant stated, that "under a deed" of 1789, which was in the Defendant's possession, his father was tenant for life, and that from 1789, his father had no greater estate than for his life. He also stated, that he himself was tenant in tail "under" the same deed.

Held, that the Plaintiff was not entitled to a production.

1846.

WASNEY

P.

TEMPEST.

his father derived title, entered into possession of the ~~B.~~ estate," and had continued to occupy and enjoy it.

The bill stated, that the Defendant had recently ~~in-~~terfered with the Plaintiff's possession of the piece of land *C.*, and prayed a declaration that the Plaintiff ~~was~~ as entitled thereto, and that the Defendant had adopted the arrangement and for a conveyance.

The Defendant, by his answer, claimed the piece of land *C.*, and stated, "that from the 24th of *April 1789* up to the time of his decease, *Stephen Tempest* was, by and under certain indentures of lease and release, bearing date respectively the 23d and 24th of *April 1789*, tenant for life of the *B.* estate, and that from and after the said 24th of *April 1789*, the said *Stephen Tempest* had no greater or other estate therein than an estate for his life." The Defendant subsequently stated, that he was tenant in tail of the *B.* estate, "under the indentures of the 23d and 24th of *April 1789*," which indentures he admitted to be in his possession.

A motion was now made for the production of these deeds, amongst other documents.

*Mr. Turner* and *Mr. Glasse*, in support of the motion. When a Defendant says he is seised in fee, you cannot adversely make him produce his title deeds; but here the Defendant does not so state, but that his father was merely tenant for life *under a particular deed*, and that he is tenant in tail under the same instrument; that is, he gives his own construction of a deed, without even shewing that he had the assistance of a professional adviser. The question in the cause depends on the right construction of the deed, and the Defendant is bound

ound to produce it, in order that the Court may determine whether his construction be correct.

1846.  
WASNEY  
v.  
TEMPEST.

They cited *Maden v. Vecovers*. (a)

Mr. *Fleming*, *contra*. The Plaintiff has no right to see the Defendant's title deeds. They make out the Defendant's title and not that of the Plaintiff, and the Plaintiff has no interest in them. In a recent case in the House of Lords, of *Dungannon v. Smith*, the accidental production of a deed endangered an estate of 10,000*l.* a year. He cited *Wigram on Discovery* (b), *Burton v. Neville* (c), *Wilson v. Forster* (d), *Compton v. Earl Grey* (e), *Sampson v. Swettenham* (g), *Bolton v. The Corporation of Liverpool*. (h)

Mr. *Turner*, in reply.

*The MASTER of the ROLLS.*

The Defendant says, that his father was tenant for life by under the deeds, and he afterwards adds, that his father had no greater estate than an estate for his life. My notion is, that I cannot consider that this is merely an attempt on his part to construe the deed for himself.

On the form of these pleadings I cannot order the production.

(a) 7 *Beav.* 489.

(b) Page 277.

(c) 2 *Cox*, 242.

(d) *McClelland & Y.* 274.

(e) 1 *Y. & J.* 154.

(g) 5 *Mad.* 16.

(h) 1 *Myl. & K.* 88.



1846.

March 28.

FORD v. BRYANT.

Application for leave to exhibit interrogatories in the Master's office, for the examination of an executor, the object being to charge him with a breach of trust not raised by the pleadings, refused with costs.

A bond, given by a testator to his daughter, was assigned by her and her husband to trustees for the daughter and children. The husband and wife subsequently assigned it to *A. B.* to secure a debt. After the testator's death, his executor, without notice, as he alleged, of the first assignment, paid to

*A. B.* the amount of the debt. A decree was made for taking the usual accounts of the testator's estate, and the trustees claimed the amount of the bond; but the Master being of opinion that, as the matter stood, the payment of the executor to *A. B.* was good, an application was made to the Court by the wife and children (Defendants in the cause) for liberty to examine the executor as to the fact of notice, but it was refused with costs.

THE testator, in this case, had given to his daughter Mrs. *Holder*, his bond for 2000*l.*, payable at his death, and which, in *February* 1830, had been assigned to two trustees for the benefit of Mrs. *Holder* and her children.

The testator died, and afterwards a bill was filed for the administration of his estate by some of the residuary legatees, against *Bryant*, his executor, against the other residuary legatees, and against Mr. and Mrs. *Holder*, and the children. The common decree was made for taking the usual accounts, and, under the advertisement for creditors, the two trustees carried in a claim for the sum of 2000*l.* alleged to be due on the bond. *Bryant*, the executor, carried in a counter state of facts, supported by his affidavit, which stated, that one *Townend* had given a notice to him, *Bryant*, that by an indenture dated the 7th of *July* 1842, the bond debt of 2000*l.* had been assigned by *Holder* and wife to *Townend*, for the benefit of *Holder's* creditors; that *Bryant* had paid to *Townend* the sum of 850*l.* in discharge of his claim to the said bond debt of 2000*l.*, and that at the time of such payment, neither *Bryant* nor his solicitor had any notice of the said assignment of *February* 1830; and that, therefore, such payment of 850*l.* was a valid and *bonâ fide*

the payment, and that the claim of the trustees was before reduced to the sum of 1150*l*.

1846.  
FORD  
v.  
BRYANT.

*Bryant* had also carried into the said Master's office discharge of the personal estate of the testator come to his hands, and had sought to be allowed the payment of the said sum of 850*l*. as a proper payment; and the Master had intimated his opinion, that as the case stood before him, *Bryant* was justified in making the payment of the 850*l*.

Mr. *Holder* also made an affidavit, which tended to show that *Bryant*, at the time of the payment, had notice of the settlement; but the Master decided, that *Holder* being interested, his evidence was inadmissible.

A motion was now made, on behalf of Mrs. *Holder* and her children, who were also interested in the residuary estate, for leave to exhibit interrogatories for the examination of *Bryant*, touching these matters, and in which it was alleged he had no beneficial interest.

Mr. *Stinton*, in support of the motion, argued, that the Defendants, being interested in making the estate productive, were entitled, for that purpose, to ascertain, through the medium of the examination of the Defendant, the fact of the alleged want of notice of the settlement, at the time of the payment of the 850*l*.; *Simmons v. Gutteridge*. (a) As to the form of the application, he cited *Franklyn v. Colquhoun* (b) and *Purcell v. McNamara*. (c)

Mr.

(a) 13 *Ves.* 262.  
(b) 16 *ib.* 218.

(c) 17 *Ves.* 434. And see  
*Paris v. Hughes*, 1 *Keen*, 1.

1846.  
  
 FORD  
 v.  
 BRYANT.

Mr. *Bagshawe*, for the Defendant *Bryant*, opposed the application. He argued, that the point in controversy was immaterial to the Plaintiff, and to the testator's estate; for if the 850*l.* were allowed to the executor, the amount due on the bond would, on the other hand, be reduced by the same amount; that it was neither the object of the bill nor within the compass of the decree to charge the Defendant with a breach of trust, and that the object of these proceedings was to determine rights as between *Bryant* and the trustees who were no parties to the suit, and that this could only be done by bill.

Mr. *Toller*, for the Plaintiff, argued, that the estate was not interested in the question, farther than the prevention of unnecessary costs.

Mr. *Stinton*, in reply. The decree enured to the benefit of all the creditors of the deceased, who are entitled to proper facilities for making out their demand. The application is not made by the trustees, because they are not parties to the suit; but by parties to the suit, who are interested as *cestuis que trust*.

#### *The MASTER of the ROLLS.*

The bill in this case is filed by a residuary legatee, against the executor and the other residuary legatee, for the administration of the estate, and the decree directs the accounts to be taken and nothing more. The trustees of the settlement came in as creditors, and allege, that they are entitled to be paid a sum of 2000*l.* due from the testator on bond. The bond is not denied; but the executor says, that the 2000*l.* is not due, because he has paid 850*l.*, part of it, to *Townend*, without notice of the assignment to the trustees; and the question in the Master's office, as between the Plaintiff

Plaintiff and the executor, is, whether this sum is to be allowed him.

1846.

FORD  
v.  
BRYANT.

The particular circumstances relating to the bond are these: — The testator, on the marriage of his daughter, executed a bond for 2000*L.*, payable shortly after his death. This bond was assigned to trustees for the benefit of the testator's daughter and her children; but *Holder*, the husband, by some means got possession of the bond, and assigned it to *Townend* as a security. After the death of the testator, his executor, *Bryant*, being applied to, and, the bond being produced, paid 850*L.* to *Townend*, and *Bryant* is told in the Master's office, "You paid this sum on the bond, knowing that it belonged to the trustees of the settlement, and now you must pay it over again, and you must be charged with the amount for the benefit of the persons interested under the settlement." This claim is made by the *cestuis que trust* under the settlement, and the matter seems to have undergone some investigation in the Master's office. *Bryant*, by his affidavit, denied he had any notice; but it is said that *Townend* made some affidavit to the contrary.

The question really is, whether you are to obtain redress for a breach of trust against *Bryant*, in a mere legatee's suit, in which he has not had the slightest notice of the claim now made against him.

There are many cases in the Master's office in which the Court will give special directions for the investigation of special claims. In a case before Lord *Eldon*, he said: In a simple case I will allow it to be done before the Master; but if the case be complicated, you must file a bill. (a)

Here

(a) See *Paynter v. Houston*, 3 *Mer.* 297., and *Lockhart v. Hardy*, 5 *Beav.* 305.

1846.

FORD  
v.  
BRYANT.

Here you seek to examine the executor as to the notice, in order to determine whether he has or has not committed a breach of trust, in order to deprive him of the allowance of this sum of 850*l*. I cannot think that such a proceeding is consistent with the forms of this Court. He may be liable for a breach of trust; but he is not to be made answerable for it except on a regular and formal proceeding.

I must refuse this motion, with costs.

May 28.

CLARK v. CHUCK.

The Master enlarged publication, and on that occasion, evidence was produced, that the Defendant had not seen the depositions. Immediately afterwards, an application was made for an additional commission, which the Master granted without any further evidence that the Defendant had not seen the depositions. Held, that it was not necessary to bring forward further proof, the Master having already in his office evidence of the fact, and the Court refused with costs an application to set aside the proceedings.

IN January 1846, a commission issued for the examination of witnesses. On the 18th of April, upon an application of the Defendant to the Master, publication was enlarged to the first day of Trinity term. On this occasion, an affidavit was produced, that the Defendant had not seen the depositions, &c.

A few days after, an application was made to the Master by the Defendant, under the 100th Order of 1845 (a), for an additional commission. The application was opposed, but the Master, on the 25th of April, gave his certificate of the propriety of such additional commission, which issued accordingly.

A motion

(a) *Ordines Can.* 322.

A motion was now made to set aside the proceedings relating to the additional commission, on the ground that upon the application for the certificate, no affidavit had been made that the Defendant had not seen the depositions.

1846.

CLARK  
v.  
CHUCK.

Mr. *Turner* and Mr. *Elmsley*, for the motion, argued, that the affidavit of the Defendant not having seen the depositions ought to have been brought down to the very moment of the application for the additional commission.

Mr. *Kindersley* and Mr. *Whitbread*, *contra*, contended, that as the Master had already in his office evidence that the Defendant had not seen the depositions, it was unnecessary to bring in fresh proof of that fact, especially as it did not appear to have been disputed.

Mr. *Turner* in reply.

The case of *Geast v. Barber (a)*, and *Gilb. For. Rom.* 130, 131. were cited.

The MASTER of the ROLLS considered this application frivolous, and said, that it was not necessary for the Master to require proof of a fact of which evidence already existed in his office, especially where it did not seem to have been disputed. He refused the motion with costs.

(a) 2 Bro. C. C. 1.

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1846.

May 22.  
June 12.

## SOWDON v. MARRIOTT.

A cause and cross-cause were attached to the Vice-Chancellor's Court. After publication had passed in the original cause, but before it had passed in the cross-cause, a Defendant obtained an order of course, at the Rolls, for liberty to use the original depositions "taken" in the cross-cause. Held, that it had not been irregularly obtained.

TWO suits relating to the same matter, namely, *Sowdon v. Marriott*, and *Flight v. Marriott*, were attached to the other branches of the Court. Publication had passed in the first of these suits, but had been enlarged until the 20th of *June* in the latter.

In this state of things, and on the 6th of *May*, *Flight* obtained an order of course, at the Rolls, in *Sowdon v. Marriott*, that he might be at liberty, at the hearing of that cause, to read the depositions "taken" in *Flight v. Marriott*, saving just exceptions.

Both causes had been set down, but the examination of witnesses in the cause of *Flight v. Marriott* was proceeding at the date of the order.

Mr. *Kindersley* and Mr. *J. A. Cooke* moved to discharge this order "for irregularity." They contended, that it was irregular to obtain an order for the use of depositions "taken," until those depositions had been really and finally completed and published; and that the depositions could only be partially used under this order. *2 Turn. & V. Pr. (a)*, 1 *Grant's Pr.* 205, and 2 *Grant's Pr.* 246.

Mr. *Turner* and Mr. *Rogers*, *contra*, contended that the order was perfectly regular, and that the reservation of "just exceptions" left every objection open at the hearing.

(a) P. 258. 285.; and see 2 *Smith's Pr.* 627.

**H**earing. That the causes being attached to the other **B**ranch of the Court, this Court could not look at the **m**erits, but must consider whether the order had been **“**irregularly obtained.” *Hooper v. Paver.* (a)

1846.  
SOWDON  
v.  
MARRIOTT.

*The MASTER of the ROLLS.*

I will make inquiry as to the practice; the difficulty arises from the position in which the two cases are situated, and from nothing else. When there are two causes in which the same question is at issue between the same parties, and publication has passed in both, nothing is more common than to obtain an order, as of course, that the depositions in one may be used in the other. I do not see any reason why it should not be obtained immediately after the causes are at issue, though I am not aware whether that has ever been done. The difficulty here is, that there has been publication in one case, and the order has been obtained in that cause, while the same witnesses are under examination in the other. It is objected, that after publication, new witnesses are not to be examined, and that the effect of this order will be, to have, as witnesses in the cause in which publication has passed, persons who have been examined subsequently; but then it is to be observed, that we have the words “saving just exceptions,” which will obviate any difficulty, and leave the question open. I think I recollect a case in which an objection of this kind was taken and succeeded, but it was in a case in which the whole matter was before the same judge. The order contains nothing which excludes *Flight* from going on and examining witnesses, and it is not until this day that he states that his examination

(a) 6 *Beavan*, 173.; and see *Can.* 114.; and the 6th Order of 9th *Ord.* of *May* 1837, *Ord.* *May* 1839, *Ord.* *Can.* 137.;



1846.  
 SOWDON  
 v.  
 MARRIOTT.

amination is concluded. By this, I suppose, he means the examination of his own witnesses, for he cannot mean, that he will not cross-examine the witnesses of the other parties, if he thinks it to his interest.

If the word "taken" be limited to the evidence at the time of the order, then the Court may be deprived of evidence material even to the other parties.

The question is, whether *Flight* is entitled to the order, and I will make inquiries.

June 12. *The MASTER of the ROLLS,*

Held that the order had not been irregularly obtained, and refused the motion with costs, "but without prejudice to any direction which might be made respecting such costs at the hearing of the cause."

June 12.

### WHICKER v. HUME.

An order was made directing preliminary inquiries, and for the production of the necessary papers. Subsequently, an order was made for an inspection of

ON the 11th of *June* 1843, an order was made for preliminary inquiries (a), with the usual direction for production before the Master of books and papers for the purposes of the inquiry.

Afterwards, on the 7th of *July* 1843, on a motion for the production of documents admitted by the Defendant

(a) *Ord. Can.* 136.

office. Held, that the latter did not supersede

ments to be in their possession, an order was made for their inspection at the office of their solicitors.

1846.

WHICKER  
v.  
HUME.

Subsequently to this, in the prosecution of the preliminary inquiries, the Plaintiff required the production of certain books and papers; but the Master considered that the order of *July*, being subsequent to the order under which he was proceeding, prevented his ordering the production.

Mr. *Purvis* and Mr. *Beavan* now moved for the production.

Mr. *Turner* and Mr. *Bagshawe*, *contra*.

The MASTER of the ROLLS was of opinion that the latter order did not supersede the former, and that they might well stand together; but as the Master entertained a difficulty, he made the order.

JONES v. ROBERTS.

June 22.

THIS was a motion, upon the answer, for an injunction to restrain proceedings at law.

An account settled, and a security taken by a solicitor from his client, though to be viewed with jealousy, is not to be treated as a nullity.

The bill alleged, that the Plaintiff had employed the Defendant as his attorney and solicitor. That, in February 1844, the Plaintiff had executed to the Defendant

A solicitor and client settled an account, and the client gave a mortgage and covenant to pay. The solicitor sued on the covenant, and the client filed a bill, impeaching the transaction on the ground of surprise, undue influence and error. This being denied by the answer, a motion for an injunction to stay proceedings on the covenant was refused.

1846.  
JONES  
v.  
ROBERTS.

Defendant a mortgage for the sum of 3400*l.*, alleged to be due from the Plaintiff to the Defendant. That the execution of the mortgage had been procured by surprise and undue influence; that there were errors and omissions in the accounts, exorbitant charges in the bills of costs, and that part of the business had been done on the retainer of another person.

The bill also stated, that the Defendant had brought an action at law against the Plaintiff upon the covenant in the mortgage deed, and it prayed that the mortgage might stand as a security for what was justly due; that the accounts might be taken and the bills taxed, and for an injunction to restrain the proceedings at law.

The Defendant, by his answer, stated, that he had been engaged in considerable and expensive proceedings for the Plaintiff, and had, at great outlay and trouble, extricated him from great pecuniary difficulties; that twelve out of thirteen of the bills of costs had been delivered in *September* 1843, that the Defendant had pressed the Plaintiff to have them examined by some other solicitor, but that the Plaintiff expressed himself satisfied therewith, and stated that that was quite unnecessary. That the accounts had afterwards been examined, settled; approved, and signed by the Plaintiff, and that the mortgage, executed in *February* 1844, admitted the amount due.

The Defendant, by his answer, distinctly denied all the several allegations of surprise and other fraud, and insisted on the benefit of the settled account.

Mr. Kindersley, Mr. Turner, and Mr. J. V. Prior now moved for an injunction. They said that the case of a security taken by a solicitor from his client stood on different

different footing from the like transactions between ordinary individuals standing in no peculiar relation towards each other, and that it was incumbent on a solicitor, in such cases, to prove his demand by other evidence than the securities themselves; *Morgan v. Lewes* (a); that in the case of *Lawless v. Mansfield* (b), it was held by Sir E. Sugden, after a full examination of the case, "that a solicitor, to whom his client has given bonds or bills, cannot rely upon them as another person might, to prove the existence of his debt; but must, irrespective of such securities, prove the debt for which the securities were given." They offered to give judgment in the action, and submitted that all further proceedings at law upon the covenant ought to be stayed, until the amount due to the Defendant in equity had been ascertained.

1846.  
JONES  
v.  
ROBERTS.

Mr. Purvis and Mr. Renshaw, *contra*, contended, that all fraud and error being distinctly negatived by the answer, there was no equity to prevent the Defendant from proceeding to recover the amount due on the settled account. That there could be no taxation of a bill of costs delivered so far back as 1843, and for which a mortgage had been taken; *Sayer v. Wagstaff*. (c) That, if the deed were to be treated as a nullity, there could be no such thing as a settled account between a solicitor and client, and that the doctrine to the extent stated in the case of *Morgan v. Lewes* had been disapproved of by Lord Cottenham, when at the Rolls; and that, at all events, the money ought to be brought into Court as a condition for the injunction.

Mr.

(a) 4 Dow, 29., and also reported 3 *Anst.* 769., 5 *Price*, 42., and 3 *Y. & Jer.* 230. and see *Hickson v. Aylward*, 3 *Molloy*, 15.  
(c) 5 *Beavan*, 415.  
(b) 1 *Drury & War.* 557.;

1846.  
 JONES  
 v.  
 ROBERTS.

Mr. Kindersley, in reply. *Sayer v. Wagstaff* only applies to applications by petition under the statute. (a). If the money be brought into Court, the Defendant ought to give up the securities.

*The MASTER of the ROLLS.*

I think both sides are labouring under a mistake in this matter: the Plaintiff in supposing, that because the transaction is between solicitor and client, this is a reason for setting the deed aside and treating it as a nullity; and the other side in thinking that a transaction made between a solicitor and his client is quite so safe.

If the parties were inclined to do what is right, the Plaintiff should pay into Court the difference between the amount secured by the mortgage and the amount received by the Defendant. If they do not consent, then I must determine their rights on the present application.

This motion, it must be observed, is made on the merits confessed by the answer, and not on proofs in the cause; and the question is, whether there are sufficient merits confessed.

*Roberts*, it appears, was the solicitor of *Jones*, for whom he was extensively employed, and a considerable sum became due to him for costs and advances. In September 1843, he sends twelve of these bills of costs to *Jones*, and it is evident from the correspondence, that the object was to obtain security, and not to enforce payment. *Roberts*, in a manner very creditable to him, proposed to the Plaintiff, that the drafts and the bills of costs should be submitted to some other solicitor for his

(a) 6 & 7 Vict. c. 73.

This perusal on his behalf. *Jones* was perfectly satisfied and considered such a course unnecessary, and that took place five months before the matter was brought to a settlement. All the allegations of surprise are therefore disposed of; for it cannot be justly said that there was any surprise when the bills had been delivered five months before the settlement.

1846.  
JONES  
v.  
ROBERTS.

The Plaintiff was then informed, that the bills were not perfect, and that some portion of the business was not therein contained, in consequence of the absence of the agent's bills. The bill alleges, that there are overcharges in them, that credit is not given for monies received, and other errors. This is denied: it may be true when the case comes to a hearing on proof; but, on the present application, I must leave these matters out of my consideration; and, when that is done, what does the case come to? This was a transaction between a solicitor and client, the amount due is settled between them, and a mortgage and covenant is given by the client to the solicitor, and on this it is said, that the solicitor is not to be at liberty to sue on the covenant. I am not prepared to lay down any such proposition.

Transactions between solicitor and client are treated with greater jealousy than like transactions between other persons, on account of the immense advantage and influence which one party has over the other, particularly in a case like this, where the client, at the time, entertained strong feeling of gratitude towards the solicitor, for having rescued him from great embarrassments and difficulties.

This Court will, therefore, look closely at a transaction between solicitor and client; but, in the absence of fraud,

1846.  
JONES  
v.  
ROBERTS.

cannot treat it as a nullity. There being nothing in this case, as it stands, but the fact of the dealing having been between solicitor and client, I must refuse this injunction.

NOTE. — An order was afterwards made by arrangement.

1839.  
Nov. 21.  
1841.  
Aug. 11.  
1846.  
Feb. 16.

### PASSINGHAM v. SHERBORN.

A testator gave power to his trustees, to become lessees of the trust property. One of them availed himself of it, and the other trustee did not actively interfere in the management of the trust. The trustee-lessee was removed by the Master of the Rolls, at the instance of the *cestui que trust*, on the ground of the inconsistency of his duties of lessee and trustee, and upon appeal on that and other grounds.

THE testator devised his real estates to Francis Sherborn and Charles Farnell, in trust for his wife for life, and afterwards, to other members of his family. He gave the trustees a leasing power, and declared "that his having appointed the said Francis Sherborn and Charles Farnell trustees and executors of his said will, should not, in any way, prevent either of them becoming the tenant or tenants of either of his farms and lands at fair rents, provided they should be disposed to rent the same; but during the lives of the persons to whom life interests were thereinbefore given, any such lease should not be made, without the consent of the person entitled under the aforesaid devises, for his or her life, to the rents and profits of the hereditaments that might be comprised therein."

The

Matters at issue at the first hearing, which are neither decided, put into a train of investigation, nor reserved, must, on further directions, be regarded either as abandoned, or as points on which the Plaintiff was entitled to no order.

At the first hearing, liberty was given to the Defendant, to bring an action as to a charge. He abstained from so doing. Held, that in the absence of some proper excuse, the charge must be considered as having failed.

A bill contained allegations of great fraud against trustees, which all failed. The trustees were removed, but not, however, on the ground of misconduct. Held, that they were entitled to the costs of the whole suit.

he testator appointed his trustees to be his ex-  
ors. In 1833 they proved his will, but *Francis*  
*Sorn* principally acted in the trust affairs.

1839.  
PASSINGHAM  
v.  
SHERBORN.

was arranged, under the authority contained in the  
that *Francis Sherborn* the trustee, and *Matthew*  
*Sorn*, his brother, should take a lease of one of the  
tor's farms, and a lease was accordingly granted by  
trustees, with the consent required, to *Matthew*  
*Sorn*, in trust for himself and his brother *Francis*  
*Sorn*.

bill was filed against the trustees and *Matthew*  
*Sorn* by the widow and parties entitled in remainder,  
aining charges "that *Francis Sherborn* had been  
y of a series of frauds, misconduct, negligence, and  
ches of trust," and that *Farnell* "had been party  
privy, and connived" thereat, and to the breaches  
ust under the lease. They insisted that the lease  
been fraudulently and improperly obtained, and  
ed accounts, and for the removal of the trustees,  
that the lease might be set aside.

here was proof that some fences had been grubbed  
and that timber had been cut down on the farm  
d to the *Sherborns*, but the value had been ac-  
ted for; and although such a course would not be  
tly right as regarded a settled estate, or as between  
lord and tenant, there was evidence to shew that  
ad been done in the course of good management,  
that the farms had been improved thereby.

The cause came on for hearing.

1839.  
Nov. 21.

Mr. *Pemberton* and Mr. *Rogers* for the Plaintiffs,

Mr. *Temple* and Mr. *Parker* for the Defendants.

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The



1839.  
 PASSINGHAM  
 v.  
 SHERBORN.  
 1839.  
 Nov. 21.

*The MASTER of the ROLLS* (as to the removal of the trustees), observed as follows:—Cases of this sort, where parties are acting in inconsistent characters, are generally very perplexing, and this is certainly not an exception.

Mr. *Farnell* scarcely appears to have acted: the only interference on his part which is spoken of, was of a nature too trifling to be considered of any importance. It cannot have been the intention of the testator, nor is it safe for the parties, where two trustees are appointed and such a right as this is given, which one avails himself of, that the other trustee should neither act nor exercise any control over the matter. Mr. *Farnell* has not acted in the course of these proceedings, but has allowed Mr. *Francis Sherborn* to act alone in the inconsistent situation of trustee and lessee; and under the circumstances of this case, I do not think that he ought to be allowed to continue to do so. If this lease should not be set aside, I think it would be greatly for his benefit and advantage hereafter that he should continue to be the farmer of this property, having to perform the ordinary duties of lessee to his lessor merely, without being mixed with the character of trustee, which has placed him in so difficult a situation hitherto, and which will continue to do so, if he should not be removed from his position of trustee. It must be referred to the Master to appoint new trustees.

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The lessees offered to give up the lease, which the Plaintiffs declined.

The decree discharged both the trustees from the office, directed accounts to be taken, and gave liberty to the Plaintiffs to bring such action at law as they might think proper.

might be advised against *Francis Sherborn* and *Matthew Sherborn*, or either of them, in respect of the breaches of covenant in the lease.

1839.  
  
 PASSINGHAM  
 v.  
 SHERBORN.

The lessee, *Matthew Sherborn*, presented his petition of appeal to the Lord Chancellor, praying that it might be reversed, and that he might be dismissed. The trustees also presented an appeal, as to so much of the decree as directed their dismissal, and on another point.

*Mr. Temple* and *Mr. Parker* in support of the appeal.

*Mr. G. Richards* and *Mr. Rogers*, *contra*.

Lord COTTENHAM (L. C.). I have had my attention again called to this case, on the supposition that I had, on a former day, disposed of the matter as between the trustees and *Matthew Sherborn*. Now, on looking back to the notes, my recollection is confirmed, that I never did dispose of the matter, as far as the trustees were concerned. I threw out difficulties and observations with regard to the case of the trustees, but I never disposed of it, or authorized the Registrar to draw up any order upon the subject. What I said, after observing upon the effect, either in the one way or the other, which the appeal might have upon the action which was to be brought, I expressed myself in these terms. "Supposing all this turns out in their favour, it may not be expedient for the Court to permit persons to remain in such a situation, where they have disqualified themselves to perform their duties. That is the ground the Master of the Rolls proceeded upon, and may ultimately be the ground on which this Court will also proceed. The only question is, whether it is expedient to proceed on that ground

1841.  
 Aug. 11.

1841.  
 PASSINGHAM  
 v.  
 SHERBORN.

ground now, or to postpone that till after the result of those inquiries is known. My strong impression is, that no damage can arise or will be likely to arise to the *cestui que trust* by postponing the consideration of that part of the case. There is a considerable probability that damage may arise by allowing that to stand part of the decree. I think, therefore, it would be more expedient to postpone that part with the other part, and then dispose of the question of the trustees all at once."

I took the papers home, for the purpose of making up my mind upon the subject, and upon examining the papers these difficulties occurred:—One of the trustees had become a lessee; the trustee had authorized certain acts to be done with regard to the property, which, it was said, amounted to a breach of covenant, and the Master of the Rolls had directed that to be tried in an action to be brought against the lessee, the lease being a lease to another person, but in fact for the benefit of himself and one of the trustees. It was argued at the bar, that these trustees had misconducted themselves with regard to the management of the property; and as I before expressed myself, I found one trustee had put himself in the situation, in which it was not very likely that he should be able to protect the estate, because he was the lessee. He was a trustee to watch over, guard, and control the conduct of the tenant, and he was himself the tenant; it occurred to me, and the strong impression of my mind certainly was, that if I discharged the trustee before the action against the tenant was brought, then, seeing how one trustee was connected with the interest of the tenants, it might prejudice the action so to be tried, and that was the ground of the observation I then made. But when I came to consider how it would operate the other way, I found a difficulty at least equivalent to that difficulty which

would attend the other mode of proceeding. It was this, — that if I did not discharge the trustee until after the action was tried, it would inevitably be contended hereafter, that the dismissal of the trustee was to depend on the result of the action, which I thought then, as I think now, ought not to be the case. I said, “Supposing all this turns in their favour,” that is, supposing they succeeded in the action, and the tenant gets a verdict, “it may not be expedient for a person to continue in such a situation, when he has disqualified himself from performing his duties.”

1841.  
  
 PASSINGHAM  
 v.  
 SHERBORN.

On looking into the whole case, it appeared to me, independent of the result of the action, that there was ample ground for removing the trustees, not merely from the situation in which one of them had placed himself by becoming lessee *simpliciter*; for if he had not gone beyond that, and if he had handed over the duty, the performance of the trust to his co-trustee, it would perhaps be harsh in the Court to say, that by doing that which the testator authorized him to do, he had disqualified himself from being trustee; but there was more than that, and more, in the dealing with the property, which affected the trustee, quite independent of the claim which may exist against the tenant under the covenant. For instance, there was a considerable cutting of timber, which may or may not be the subject of complaint against the tenant, as such; but it is quite clear, that it is the subject of complaint against the trustees who received the money, and who, in so doing, appear to have certainly acted contrary to the intention of the testator and for the benefit of the lessee.

There are expressions used, which show that they were to be lessees of arable land and not lessees of trees,

1841.  
  
 PASSINGHAM  
 v.  
 SHERBORN.

trees, growers of corn, but not growers of timber. It was thought inconvenient for a lessee to have so much timber covering the ground, but it might be very convenient for some of those whose interests were represented by the trustees; and it certainly appears to have been the wish of the testator that the timber should remain. Independent, therefore, of the result of the action to be tried against the tenant, there were circumstances connected with the property, shewing that the union of those two characters of trustee and lessee had been such, as to create an impediment in the due performance of the duty of the trustees towards the estate. I, therefore, thought, there was more objection to permitting the trustees to remain, upon a decree which would have implied that their removal was to depend on the result of the action, and that independent of the result of the action, there was sufficient ground for making it the duty of the Court to dismiss them.

On those grounds I have come to the conclusion, looking at the papers, that the Master of the Rolls was right in dismissing the trustees at the hearing.

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On *Matthew Sherborn's* appeal, it was ordered that the bill should be dismissed, as against him, with costs.

On the other appeal, the decree of the Master of the Rolls was affirmed with costs, except in an immaterial particular.

The Plaintiffs brought no action, and the accounts having been taken, it was found that a balance of 102*l.* 15*s.* 6*d.* was due to the trustees.

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The

The cause now came on for further directions.

1846.

PASSINGHAM  
v.  
SHERBORN.

1846.  
Feb. 16.

Mr. *Rogers* for the Plaintiffs, argued that the necessity of instituting the suit had been caused by the trustees who had been removed, and that they ought to pay the costs.

*The MASTER of the ROLLS.*

There has been no action and no verdict in your favour; you come back in the same situation as if you had failed, and there had been a verdict for the Defendants. I must, therefore, assume there have been no breaches of covenant.

Mr. *Kindersley*, Mr. *Turner*, and Mr. *Parker*, for the Defendants the trustees. The bill contains a string of charges of the grossest fraud and design on the part of the trustees, which have all failed. The rule of the Court is, to visit with costs parties who recklessly bring forward in their bills unfounded charges of fraud and malversation. The account is in favour of the Defendants; and the only part in which the Plaintiffs have succeeded is, in the removal of the trustees, not on their misconduct, but from the inconsistency of their position, which the testator not only sanctioned by his will, but, as appears from the answer (which may be read on costs), he expressly requested.

*The MASTER of the ROLLS.*

The only part on which I have any doubt is as to the costs of the removal of the trustees.

Mr. *Rogers*, in reply, stated, that the action had not been prosecuted in consequence of the death of Mrs. *Passingham* in 1840.

*The*

1846.

PASSINGHAM  
v.  
SHERBORN.

Feb. 16.

*The MASTER of the ROLLS.*

There does not appear to me to be any doubt as to what substantially and justly ought to be done in this case.

The Defendants, the trustees of the testator's will had, by the will itself, the unfortunate permission given to them, or either of them, to become lessees of the property, and from the answer, which must be regarded as the question of costs, it appears, that the testator had particularly requested the Defendant, who did take the lease, to accept a lease. In consequence of the licence or power thus given by the will, and as it would seem, also, in consequence of the request of the testator, Mr. Francis Sherborn, one of the trustees, did become lessee of this property, in the form that has been stated. In consequence of some disagreement between the parties, a bill is filed. This bill seems to contain charges of the grossest breaches of trust under the will, of the grossest breaches of the covenant under the lease, and various acts quite contrary to, and in utter violation of their duty as trustees. That was answered by the trustees and evidence was gone into on both sides.

When such charges are in the bill, and the parties have gone into evidence on both sides and a decree is made, we are to look at the decree, for the purpose of ascertaining what was the opinion and decision of the Court upon those charges, and if we find that no notice whatever is taken in the decree of matter in issue, and which might and ought to have been decided at the time of the hearing, we must conclude, either that those charges were abandoned at the hearing, or that they were presented to the Court in such a manner, as to induce it to abstain from making any order in respect of them. This is invariably the rule, unless there be introduced into the decree a reservation of any particular

cular matter, which the Court may find in issue, and yet not ripe for decision. But if no such reservation be made, and no inquiry or investigation directed, the almost necessary conclusion is, that the matter was considered not to be in such a state as to entitle the Plaintiff to any order on it. If there be any error in the decree in that respect, it cannot be corrected on further directions on the Master's report, but only by a rehearing. This practice is so common, and so generally resorted to, that one feels rather surprised at being under the necessity of explaining it.

1846.  
  
 PASSINGHAM  
 v.  
 SHERBORN.

In this case, there being complaints of breaches of trust, and of breaches of covenant, there was a particular liberty given to the parties to have the breaches of covenant tried by an action. Either the breaches of covenant were supposed to be connected with the breaches of trust, or they were not. If they were supposed to be connected, then the decision upon the breaches of trust was to be dependent on the result of the trial of the action. If they were not connected, then the Court came to the conclusion that no order ought to be made on the breaches of trust, not connected with the breaches of covenant. In either way it seems to me that I must, on the present occasion, consider that matter to be disposed of.

On a question of costs, every thing that has taken place in the cause, is or may have to be considered, the conduct of the parties, and so on: but I am not now, on further directions, to come to the conclusion that a thing has been proved, when I find no order made on that allegation shewing it to have been proved, still less am I to consider it as proved by the production of the deposition, or the evidence of some particular witness, without having regard to all the other evidence, that

VOL. IX.

*Ff*

may



1846.  
 PASSINGHAM  
 v.  
 SHERBORN.

may have been brought to bear on the matter. Therefore, on this occasion I must entirely lay aside all I have heard to day, in relation to all those matters that were in issue for the purpose of obtaining an order affecting the merits.

All these points have been dwelt on, on behalf of the Plaintiffs for the purpose, if possible, of saving them from the consequences of the result of the cause, which result has been an absolute failure of all those charges of fraud, breaches of trust, and breaches of covenant, which have been so put forward by the bill. I will not say that not bringing an action is conclusive on a point of this kind, but it is conclusive in the absence of any proper excuse upon the record, and in the absence of any substitute for that which the party obtained leave to do, for the purpose of establishing his case. The bill was dismissed against one of the parties against whom leave was given to bring the action, and it is said, that it was not convenient to go on, as the tenant for life was dead, but her representatives were before the Court, who might have tried it; and if there had been any difficulty in trying it, after that party had been removed from the record, that difficulty ought to have been seen right by a proper application to the Court.

What has taken place in the Master's office? There was a decree directing certain accounts and inquiries. The Master has charged these Defendants with all the sums they received, and given them credit for the sum they paid; and as to those, in respect of which there might have been a reasonable doubt whether the sum were properly paid, he has distinctly found, that they were properly paid; and it appears, on the result of the accounts thus taken, that the trustees, instead of being indebted to the estate, have paid more money than

than they have received. They have now at this time 102*l*. due to them, not a very large sum, but after charging them with all they have received, and giving them credit only for those sums which they had properly paid, they are still out of pocket.

1846.  
  
 PASSINGHAM  
 v.  
 SHERBORN.

I am asked to give costs against them, when, after having set aside all those things which, under the circumstances, I must consider to have been decided in their favour at the hearing, there, in point of fact, remains only this, that they have been removed from being trustees. Now, were they removed from being trustees in consequence of misconduct, in consequence of breaches of trust, or in consequence of breaches of covenant? That is answered by the former observations that there is no decree in respect of the breaches of trust, unless those breaches of trust are considered to be connected with the breaches of covenant; and with respect to the breaches of covenant, that the Plaintiffs have not gone on to prove there were any. It was not, therefore, on account of misconduct, but in consequence of the situation in which one of the trustees had placed himself. That unfortunate connection of interest and duty conflicting with one another is very much indeed to be lamented, and if the trustees had, voluntarily, spontaneously, and of their own accord, done this for their own interest, I should have felt there was a good deal of ground for demanding costs against them: but when I find from the answer, which I must attend to on the question of costs, that the testator specially requested it, then I have only to consider, whether, under those special circumstances, they themselves did any thing improper in the execution of the power which the testator gave them. The lease is so proper, and is in fact so valuable, that the Plaintiffs by no means wish to get rid of it, on the con-

1846.  
PASSINGHAM  
v.  
SHERBORN.

trary, they wish to hold the Defendant to the terms of that lease. The lease seems to have been a proper lease to have been granted, and the only objection to it seems to be, that unfortunate connection, which the testator himself not only specially authorized but specially requested.

I own I cannot find it consistent with my duty to charge them with costs for doing that which the testator expressly desired them to do; and, though I still think it is not right to permit trustees to remain in a situation in which their interests must necessarily conflict with their duty, and that it was fit for them, under such circumstances, to retire, yet I think that the difficulty did not arise from any misconduct of theirs, but that they were led into it by the testator himself.

I think that the trustees are entitled to the costs of this suit.

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1846.

HULME v. CHITTY.

April 21, 22.

**B**Y indenture made the 4th December 1802, between *Joseph Chitty* of the first part, *Elizabeth*, his wife, of the second part, and two trustees, of the third part, after reciting that *Joseph Chitty* and his wife "had mutually agreed to live separate and apart from each other during the remainder of their joint natural lives, and that, upon the treaty for such separation, *Joseph Chitty* did propose and agree, to allow and pay, during his life, for the maintenance and support of his wife, and for the maintenance, education, support and provision of the children of them the said *Joseph Chitty* and *Elizabeth* his wife, or such of them as should, from time to time be living, the annual sum of money thereafter mentioned, and to make such further and other provision for his wife and children after his decease, as hereinafter mentioned," it was witnessed "that, in pursuance of the said agreement, and for the intents and purposes aforesaid," *Joseph Chitty* did covenant with the trustees in manner following:

That it should be lawful for Mrs. *Chitty* "at all times hereafter during their joint lives" to live separate and apart from her husband, in such place as she should think fit. That he *Joseph Chitty* would not "at any time or times thereafter," commence any suit &c. to compel her to cohabit with him, or molest or visit her, and would suffer "all and every the children of the said

*Elizabeth*

Upon a separation between *A.* and *B.* (husband and wife), a deed was executed, making a provision for the wife, and all and every the children of *A.* by *B.* who should attain twenty-one. A reconciliation took place, and another child was born. Held, upon the construction of the deed, that such last mentioned child did not participate in the provision.

This Court, when it can consistently with the instrument executed by the parties, will do that which is the highest equity, make an equality between parties who stand in the same relation; but it cannot do that contrary to the plain meaning of a deed.

to the plain meaning of a deed.

1846.

HULME

v.

CHITTY.

*Elizabeth Chitty* by him *Joseph Chitty* begotten" to reside with her and be wholly under her care &c.; and that it should be lawful for her "at all times thereafter" to hold for her separate use certain property she had, or should, "at any time thereafter," buy or acquire, and that the trustees of the deed might be possessed thereof in trust for her.

He also covenanted with the trustees to pay the during his life an annuity of 550*l.* a year, which it was agreed they should hold, in trust, "during the lives of the said *Elizabeth Chitty*, and of her children by the said *Joseph Chitty*, and of the survivors and survivor of them, for the said *Elizabeth Chitty* and her said children," but to be applied for their maintenance, support, &c., according to the discretion of the trustees; and if the whole should not be applied in any one year, to accumulate the surplus, and to hold, on the trusts after declared of a sum of 1500*l.*, but so that the surplus of one year might be applied towards the purposes of any succeeding year; and the annuity was to cease if *Mrs. Chitty* and all her said children should die in the lifetime of *Mr. Chitty*. And after reciting, that there were living, at the execution of the said indenture, five children of them *Joseph Chitty* and *Elizabeth* his wife, and that it had been agreed, that "after the death of *Elizabeth Chitty* (in case the same should happen in the lifetime of *Joseph Chitty*) the sum of 75*l.* should cease or be deducted from the annual sum of 550*l.*, so to be paid by *Joseph Chitty* in manner aforesaid, for each and every of the five children, who should or might be dead at the time of the death of *Elizabeth Chitty*, or in case of the death of any or either of them, at any time or times after the death of *Elizabeth Chitty*, leaving *Joseph Chitty*, then the like abatement should be made from the time of such their respective

tive deaths;" it was further agreed that, upon the death of *Elizabeth Chitty* in the lifetime of *Joseph Chitty*, the sum of 75*l.* should cease or be deducted from the sum of 550*l.* "for each and every of the said five children of them the said *Joseph Chitty* and *Elizabeth Chitty*" who might be dead at the death of the said *Elizabeth Chitty*: and a similar agreement was declared in case of the death of any of them, after the death of Mrs. *Chitty*. And after reciting that *Joseph Chitty* had agreed to insure his life for 1500*l.*, he covenanted with the trustees to keep the policy on foot. And it was declared, that the trustees should invest the monies received therefrom, and during the life of *Elizabeth Chitty* should apply the dividends in the same manner as declared concerning the annuity of 550*l.* And after the decease of the survivor of them, *Joseph Chitty* and *Elizabeth Chitty*, to hold the fund on trusts which were declared in the following terms:—"in trust for all and every such child and children of the said *Joseph Chitty* on the body of the said *Elizabeth Chitty* his wife, lawfully begotten, who, being a son or sons, should live to attain his or their age, or respective ages of twenty-one years, or, being a daughter or daughters, should live to attain her or their age of twenty-one years or be married, which should first happen, equally to be divided between them, share and share alike."

1846.

HULME  
v.  
CHITTY.

The deed contained a power to maintain, &c. the children until the shares vested, and a limitation of the fund to *Joseph Chitty* his executors, &c. "in case none of the said children of *Elizabeth Chitty* by *Joseph Chitty*, should live to attain a vested interest."

There were five children at the date of the separation.

1846.

HULNE  
v.  
CHITTY.

In 1812 a reconciliation took place between Mr. and Mrs. Chitty, and afterwards, in 1815, another child, *Thompson Chitty*, was born. Mr. Chitty continued to keep up the policy, and also, in 1824, joined in the appointment of new trustees.

The parties lived together until 1841, when Mr. Chitty died. His wife died in the following year. The only question in the cause was, whether *Thompson Chitty*, who had attained twenty-one, was entitled to participate in the fund provided for the children attaining twenty-one, and which, with the savings, amounted to nearly 10,000*l*.

Mr. *Kindersley* and Mr. *Willcock* for the Plaintiffs, who were entitled to the share of one of the children born at the date of the settlement.

Mr. *Turner*, Mr. *Robson*, Mr. *Stevens*, Mr. *Hardy*, and Mr. *Kinglake* in the same interest.

Mr. *Tinney* and Mr. *Heathfield* for the trustees.

Mr. *Roupell* and Mr. *Jones* for *Thompson Chitty*.

*The MASTER of the ROLLS.*

In this case, it appears, that Mr. and Mrs. Chitty, in the year 1802, had five children, and that they there agreed to live separate and apart from each other, and to execute a deed, which provided for the living apart, and also made provision for the wife and the children, who were to live with their mother apart from their father. It is expressly stated, at the very beginning of this deed, that it was intended and agreed between them, that the separation should con-

tinue for their joint lives, and Mr. *Chitty* expressly entered into those covenants which were necessary to enable his wife so to live separate and apart from him, and he covenanted that he would not "at any time thereafter" visit her, or, in any way, interfere with that separate mode of living. There cannot be the least doubt, therefore, and we have here evidence beyond all controversy, that the then intention of the parties at that time was, to live separate and apart from each other during the rest of their lives.

1846.  
HULME  
v.  
CHITTY.

I say, "the then intention" of these parties, because no covenants or agreements of this kind are obligatory. If they think fit to perform towards each other those conjugal duties which they have previously vowed, there is nothing in any deed of this kind which can prevent their doing so. We are to consider, on this occasion, what was the intention of these parties, on the execution of this deed; and there can, I apprehend, be no doubt whatever, because they have declared, under their hands, that their agreement and intention was to live separate and apart during their lives, and all that may be said respecting their having a contemplation of coming together again is quite out of the question here.

That being the agreement existing between them, as recited in this deed, and to be carried into effect by its provisions and by the covenants of Mr. *Chitty*, the parties had two distinct objects; first, they proposed to provide, during the life of Mr. *Chitty*, for the maintenance and support of his wife and children, or such of them as should, from time to time be living, a certain annual sum, subsequently stated to be 550*l*. When they entered into an agreement shewing their intention, that there



1846.

  
 HULME  
 v.  
 CHITTY.

there should be no longer any communication or visiting between them, can it be doubted, that when they speak of their children here, they meant the children then living?

The next object distinctly stated was, to make such further and other provision for his said wife and children as after mentioned. How was that done? 550*l.* a year was to be paid by Mr. *Chitty* during his life, and the trustees of the deed were to pay so much only of the sum as they should think fit to Mrs. *Chitty*, for the support and maintenance of herself and children, and the saving of one year might be applied towards any extra expence occurring in any future year; but if there should be a saving in any year, not wanted for the purposes of another year, that saving was to be accumulated. In this way provision was made for the maintenance and support of the wife and children, which was the first object of the deed: but Mr. *Chitty* only agreed to pay this annuity during his life, and to make a provision after his death, he effected a policy of insurance for 1500*l.*, and the saving to which I referred, was to be applied in the same manner as the 1500*l.* the amount of the policy of insurance, that is, in case Mr. *Chitty* should die first, the income of the fund was to be paid to Mrs. *Chitty* for the support of herself and her children.

Now all this seems to be so clear and so plainly set forth in the deed, that I do not think that any doubt has even been raised on it. It was the subsequent part of the deed to which I am about to refer, which has been discussed and argued with so much ability and with no less zeal. The question was and is as to the provision to be made on the death of the survivor of  
 them.

them. The insurance money and savings were to be held, "in trust for all and every such child or children of Mr. *Chitty* on the body of Mrs. *Chitty* begotten, who, being a son or sons, shall live to attain his or their age, or respective ages of twenty-one years, or being a daughter or daughters shall live to attain her or their age, or respective ages of twenty-one years, or be married, which shall first happen, equally to be divided between them."

1846.

  
HULME  
v.  
CHITTY.

Now, considering what were the objects of this deed, who were the persons to be provided for, what were the provisions as to these parties living together again, the whole deed being founded on an agreement to separate for the rest of their joint lives, and that he had covenanted not to visit her, I think it perfectly clear, even if there had been much more ambiguity than there is in this particular clause, that the only objects intended to be provided for by this deed were, the wife and the children living at the date of the deed. What subsequently happened has made all the difficulty, which nobody can look at without considerable regret. There is nothing to show, that *Thompson Chitty* was not as much an object, and properly as much an object, of the affection of his father, and as much entitled to a provision, as any of the children born before the separation; and, no doubt, this Court, when it can do so consistently with the instrument executed by the parties, will do that which is the highest equity, namely, make an equality between parties who stand in the same relation; but it cannot do that contrary to the plain meaning of a deed.

Mr. and Mrs. *Chitty*, intending to live separate and apart for the rest of their lives, did live separate and apart for ten years after the date of that deed, and  
at

1846.

HULME

v.

CHITTY.

at the end of that time, in perfect accordance with their moral and religious duties, though quite contrary to the contemplation which they had at the time they executed this deed, they became reconciled, and lived together again, for not less than twenty-nine years after that reconciliation. The consequence of their subsequent cohabitation was the birth of *Thompson Chitty*; and the contention before me now is this, that he, "being a child of Mr. and Mrs. *Chitty* lawfully begotten," and having attained twenty-one, is entitled to a share of the provision made by this deed. I should be very glad to find, consistently with my duty, that I could construe this deed so as to give him that right, but it is impossible for me to do so; I must look at every part of the deed, and though it may be true looking at this clause alone, and without taking into consideration the circumstances under which the deed was executed, and the avowed purpose for which the provision was made, that this clause might have that effect, yet, taking the words of the clause in relation to and in connection with the other parts of the deed, and the whole scope and intention of the deed, and of the parties thereto, it appears to me that it cannot have that effect given to it.

I cannot adopt the argument, that I must collect from this clause, standing by itself and unconnected with the rest of the deed, that these parties agreed and intended to make a provision for children who might be born after a reconciliation. I say that the recitals in this deed prevent my adopting such a construction. They exclude it, not because the deed prevented these parties from cohabiting again, for no deed could legally do that; but they effectually exclude the notion that, at the time when the deed was executed, these parties intended to make a provision for a family to be born  
after

after a reconciliation. It is plain from the deed, that (though they could not bind themselves to a continued separation, for the law will not allow them to do it) their intention was, that there should be a continued separation, and that is quite inconsistent with a notion that they were making provision for a family to be born after a reconciliation.

1846.

HULME  
v.  
CHITTY.

On the whole, I feel myself bound to declare, that the provision created by this deed was for the wife and the children of the marriage then existing.

SALMON v. ANDERSON.

June 2.

**T**HIS case came on upon demurrer to the whole bill.

The testator gave 6000*l.* 3 per cents. to trustees, on trust to pay the dividends of 5000*l.* to his nephew *James Patterson* for life, and the dividends of 1000*l.*, residue thereof, to *Alexander Patterson* for life; and upon the decease of either of them, the said *James Patterson* and *Alexander Patterson*, he thereby ordered and directed, that the interest or share of him so dying should belong and be paid unto the next of kin of him so dying as aforesaid, until both of them, the said *James Patterson* and *Alexander Patterson*, should happen to depart this life; and upon the death of the survivor of them, the said *James Patterson* and *Alexander Patterson*, he ordered and directed the said sum of 6000*l.* 3 per cent.

A fund was alleged to have been carried in an administration suit, "to a separate account, intitled the general account." In another suit, to give effect to the assignment of a share of the fund, Held, that the legal personal representative of the testator was a necessary party.

The ultimate limitation of a legacy was to a party's

"personal representatives or next of kin." Held, that both classes must be made parties to a suit affecting the fund.

1846.  
  
 SALMON  
 v.  
 ANDERSON.

cent. reduced bank annuities to be sold out by his ~~sa~~<sup>sa</sup> ~~i~~<sup>i</sup>.  
 executors, and the money arising thereby to be equa~~l~~<sup>l</sup>.  
 divided, between all and every the children of his ~~sa~~<sup>sa</sup> ~~i~~<sup>i</sup>.  
 two nephews *James Patterson* and *Alexander Patterson*  
 share and share alike; and if any of them should ~~be~~  
 then dead, he gave the part or share of him or them ~~so~~  
 dying, *unto their personal representatives or next of kin.*

The testator declared it to be his will, that his ~~said~~  
 nephew *Alexander Patterson* should not, in case of  
 the death of any or either of the legatees thereinbefore  
 named, intestate or without issue, be entitled to have,  
 receive, or take any beneficial interest or share, which  
 he might or could claim, as one of the next of kin of  
 the person or persons so dying intestate, or without  
 issue.

*James Patterson* died in the testator's lifetime without  
 having been married. *Alexander* was still living, and  
 had two children *John* and *Janet*.

*Kineard* was the surviving trustee and executor of  
 the testator's will.

In 1819, a suit was instituted in the Exchequer  
 against *Kineard*, for the administration of the estate.  
 In that suit (according to the allegations of the present  
 bill) the sum of 6000*l.* was, by the decree, ordered to  
 be paid into Court, and it was paid in accordingly and  
 carried "to a separate account entitled the *General Ac-*  
*count,*" for the purpose of meeting the bequest to the  
 testator's nephews.

By a subsequent order, it was declared, that the next  
 of kin of *James* were entitled to the dividends on the  
 5000*l.*,

, and such dividends (as this bill alleged by e) were ordered to be paid to *Alexander Patterson* who, by the will, was expressly excluded from

1846.

*SALMON*  
v.  
*ANDERSON,*

remedy this mistake, *Alexander Patterson* assigned dividends to *Swinton* for the benefit of his two son *John* and *Janet*. *Janet* and her husband sold are in the funds, vested, contingent or accruing, to plaintiff, and they, together with *Alexander Patterson Swinton* (who, in the assignment, admitted that all claim against the trust funds had been satisfied,) sold the share they purchased to the Plaintiff. By agreement, *Alexander* gave a power of attorney to defendant *M'Pherson* to receive the dividends, who, at the time, paid to the Plaintiff his share.

and, the son of *Alexander*, died in 1845, and the plaintiff, being unable to obtain payment of his share dividends, as he alleged, through collusion between *Alexander* and *M'Pherson*, filed this bill to rescind the assignment, and to obtain payment of the dividends.

On this bill, *Alexander Patterson* filed a demurrer for want of equity, and also for want of parties, insisting first, *John Kineard*, secondly, the personal representative of *John Patterson*, thirdly, the next of kin of *John Patterson*, and fourthly, *Archibald Swinton*, were necessary parties to the suit.

The demurrer now came on for argument.

*Purvis* and Mr. *Toller*, in support of the demurrer. First, *Alexander Patterson* has no concern with the

1846.  
  
 SALMON  
 v.  
 ANDERSON.

the share of *Janet*, and ought not to be mixed up with disputes concerning it. The relief sought might have been obtained by a mere petition in the cause. Secondly, *John Kineard*, the legal personal representative of the testator, is a necessary party to the suit, in order to see to the due application of the fund standing to the "general account." Thirdly, after the death of both the nephews *James* and *Alexander*, the fund is limited to their children, and if any be dead (as is now the case of *John*), "to their personal representatives or next of kin," therefore, both the personal representatives and next of kin of *John* are necessary parties. Fourthly, *Archibald Swinton* to whom, by the deed of *August* 1825, *Alexander* assigned the dividends on the 5000*l.* for the benefit of his children, is a necessary party.

*Mr. Turner* and *Mr. James Anderson*, in support of the bill. The order in the Exchequer directs the whole dividends to be paid to *Alexander*. He has assigned his interest, has concurred in the assignment to the Plaintiff, has acted thereon, and is charged to collude with *M<sup>r</sup> Pherson*. There is therefore a clear equity against him. The Plaintiff could not obtain a remedy by petition; but if he could, that would not exclude him from seeking it by bill, though, according to a decision of *Sir John Leach*, it might be the ground for depriving him of costs.

Secondly, the fund stands to the "separate account" being therefore judicially appropriated to these legacies, the legal personal representative of the testator has now no interest or concern in it, and is not therefore a necessary party.

Thirdly, the limitation to "the personal representatives

tives or next of kin," means the next of kin of *John*, under the statute of distributions, and his father and sister are next of kin, and are already before the Court.

Fourthly, *Swinton* has no interest: he is a mere trustee of an equity.

Mr. *Purvis*, in reply.

*The MASTER of the ROLLS.*

There was a suit in the Exchequer to administer the estate of the testator, and a fund applicable to the payment of the legacies was carried to what is called "the separate account, intituled the general account." I am desired to conclude, that this was a carrying over, not to a general credit in the cause, but to the particular legacies in question, thus severing these legacies from the rest of the testator's estate. Whatever may have been the intention, I cannot consider the word "general" as meaning "particular and exclusive." It is probable, that the word "general" was inserted for the purpose of insuring the future consideration of the interests of other parties. I think the legal personal representative of the testator is a necessary party to this suit.

With respect to personal representatives and next of kin, I do not consider the words of the will, "personal representatives or next of kin," to be so clear as to dispense with their presence. I have a very strong impression, but I do not think the case so perfectly clear that I could determine in the absence of these parties. I think, therefore, that the legal personal representatives of *John*, and his next of kin, ought to be parties.

With regard to the remaining party, I cannot say that I consider him a necessary party. A very cautious pleader might have made him a party, or served him

VOL. IX.

G g

with

1846.  
SALMON  
&  
ANDERSON.



1846.  
  
 SALMON  
 v.  
 ANDERSON.

with a copy of the bill. He might, probably, have been a necessary party if the assignment had been followed up by an order to pay the dividends to him, but that was not done.

I think that I must overrule the demurrer both for want of equity and for want of making *Swinton* a party : but I must allow it as to the other parties. I give leave to amend, and no costs.

Feb. 18, 19, 20.  
 April 17.

## SPARLING v. PARKER.

Shares in gas light and in a dock company, which possessed real estate for the purposes of their undertaking, Held, not within the Statute of Mortmain.

THE testator, in this cause, bequeathed four charitable legacies of 500*l.* each. By the decree, it was referred to the Master to take the usual accounts; and with a view to the question whether any abatement of these legacies ought to be made, under the operation of the Statute of Mortmain, the Master was directed to distinguish such parts of the testator's personal estate, as, at the time of his death, consisted of leaseholds, mortgage securities, or other chattels real, or otherwise arising from or connected with, land.

The Master found, that the testator was not possessed of any leasehold estates, but was possessed of several mortgage securities, and that the other parts of his personal estate consisted of chattels real, or otherwise, arising from or connected with land, which were particularly stated in the second part of the schedule to his report, and which were there particularised as consisting of five 100*l.* shares in the *Liverpool* Gas Light Company; sixty 50*l.* shares in the *Edinburgh* and *Glasgow* Railway Company; forty-five 20*l.*

n the *Edinburgh, Leith, and Newhaven* Railway Company; ten 20*l.* shares in the *Lancaster* Gas Light Company, and forty 100*l.* shares in the *Harrington* Dock Company.

1846.  
SPARLING  
&  
PARKER.

The *Liverpool* Gas Light Company was incorporated by act of parliament (58 G. 3. c. lxvi.), and empowered to purchase lands and buildings. The subscribers to the joint stock (which was to be 50,000*l.*), were each of them to be entitled to a right and interest in the capital joint stock, in proportion to the number of shares which he held in the same capital joint stock, and to a like proportionate share of the profits and advantages attending the capital stock; and it was enacted, that all shares in the undertaking, and in the net profits and advantages thereof, should be deemed *personal estate*, and not of the nature of real estate, and, as such personal estate, should be transmissible accordingly.

The *Lancaster* Gas Light Company was a partnership, constituted by deed dated the 20th of *January* 1826, and whereby the stock, amounting to 9000*l.*, was to be raised and contributed in shares of 20*l.* each, and to be assignable in a prescribed form. The lands, houses, buildings, and other things belonging to the company were to be vested in trustees; and it was expressly provided, that the shares in such lands, houses, buildings, and other things, or in the purchase money for the same, should be, and be deemed, *personal estate*. There was power to dissolve the concern, to sell the property, and apply the money in a due manner, and then divide the residue, if any, amongst the shareholders, according to their respective shares and interests therein.

1846.  
 SPARLING  
 v.  
 PARKER.

The *Harrington Dock Company* was also a partnership, constituted by deed dated the 12th of July 1834 and was formed for purchasing land for 150,000*l.*, and converting and improving the same by the erection of a sea-wall, for the formation of canals, docks, wharfs, and buildings, and for the reception and discharge of ships and other things thereto appertaining. The capital was to be 200,000*l.*, divided into 2000 shares of 100*l.* each. The company might raise money on mortgage, and invest money on real securities; and it was provided, that all the property of the company, as between the shareholders, should always be considered as *personal estate*; and every shareholder was to be interested in the profits and liable to the losses of the company, in proportion to his share, and there was to be no benefit of survivorship among the shareholders, but every shareholder was to have a distinct and separate right to his shares, and the same were, subject to the regulations of the deed, to be subject to disposition by deed or will, or in case of intestacy, to be transmissible to his personal representatives. There was a provision for dissolution, for sale of the property, winding up of the concern, and dividing any surplus among the shareholders.

Each of these companies (and the *Harrington Dock Company* to a very large extent), was possessed of and entitled to real estate, as part of its joint stock or capital.

The case came on for further directions, and the question was (*a*), whether these shares were, to that extent, within the Mortmain Act.

Mr. *Turner* and Mr. *Geldart*, for the Plaintiffs, were trustees of the charitable legacy.

(*a*) There was another question more convenient to be argued, which it is thought rate; see *post*, p. 524.

It is plain that the *Scotch* Railway shares are not within the Statute of Mortmain. Real and personal estate lying or being within *Scotland*, are expressly excepted from the operation of that statute (*a*), and legacies to be laid out in *Scotland*, for the purposes of charity have been held valid. *Oliphant v. Hendrie* (*b*), *Mackintosh v. Townsend*. (*c*)

1846.  
SPARLING  
v.  
PARKER.

The several other shares are not within the Mortmain Act, they are, either by act of parliament or contract, to be deemed "personal estate," and not realty, and they confer no interest in land. In *Bligh v. Brent* (*d*), it was held that real property, held for the purposes of a trading company, was, in equity, to be deemed personalty, and that the interest in shares in the *Chelsea Waterworks Company* would pass by an unattested will. The shareholders have no option of taking their share of the real estate or any part of it, but, upon winding up the concern, the whole must be converted into personalty, and then divided in that form. The difficulty of separating the realty from the personalty, in such cases, would be almost insuperable, and the recent authorities shew that shares in public trading companies are not within the statute. Thus, it was held, by Lord Cottenham, when Master of the Rolls, in the case of *The Attorney-General v. Giles* (*e*), that a gift of *East India* stock to charity was not void. So, in *March v. The Attorney-General* (*g*) policies of assurance payable out of the funds of different assurance companies were held not within the Statute of Mortmain, although the assets consisted partly of real estate; again, in *Thompson v. Thompson* (*h*),

it

(*a*) 9 G. 2. c. 36. s. 6.

(*b*) 1 B. C. C. 571.

(*c*) 16 Ves. 330.

(*d*) 2 Y. & Col. Ex. 268.

(*e*) *Shelford*, 987., and cited  
5 *Beavan*, 436.

(*g*) 5 *Beavan*, 433.

(*h*) 1 *Colly*. 381.

1846.  
  
 SPARLING  
 v.  
 PARKER.

it was held by the Vice-Chancellor *Knight Bruce*, that the shares in the *London Gas Light and Coke Company* were not within the statute.

Mr. *Purvis* and Mr. *Walpole*, for the tenant for life, and Mr. *Roupell* and Mr. *Whitmarsh junior*, for the remainder man.

We admit that the *Scotch* railway shares are not, but we contend that all the other shares are, within the statute.

It is perfectly immaterial, whether they are "personal estate," or, whether they descend as such. Leaseholds and many other species of property are personal estate and descend as such, but it never has yet been doubted that leaseholds are "interests" in "lands, tenements, or other hereditaments," and within the statute. The *Liverpool Gas Light Company's Act* made the shares personal estate for the purposes of transmission, but not for the purpose of enabling the owners to bequeath them to charity; there is no trace of any such object. Besides, it is clear that a party has no power to give to his real estate the quality of personalty, so as to contravene the provisions of a positive declaratory act, passed to prevent the disinheritance of lawful heirs. A testator may by his will convert his realty out and out, as in *Phillips v. Phillips* (a) as between his representatives, or the Court may hold realty to be impressed with the character of personalty, for certain purposes between individuals, *Du Hourmelin v. Sheldon* (b); but it limits such a transmutation to these particular objects, *Matson v. Swift*. (c) A party cannot, to all intents and purposes, alter

(a) 1 *Myl. & K.* 649.

(c) 8 *Beavan*, 368.

(b) 1 *Beavan*, 79., and 4 *Myl. & Cr.* 525.

alter the legal character of his property, by directing that it shall be considered part of his personal estate, *Barker v. May.* (a)

1846.  
SPARLING  
v.  
PARKER.

If a partner in a brewery having a large real estate for the purposes of the trade, were to leave the whole of his interest to a charity, then although the realty might be considered as personalty for some purposes, yet the gift of it to charity would be invalid; the very case has occurred in the case of *Day v. Croft.* (b)

It cannot be said that the interest of the shareholders is unconnected with the land. It is a direct interest in the land; there is the dock itself, the land covered with water, the land on which the gasometer is built, and lands, houses, and buildings, connected therewith, and the right of carrying the gas pipes through the land.

[*The MASTER of the ROLLS.*

What is the interest of each particular shareholder? How can he realise the value? Can he, under any ordinary circumstances, make himself owner of any part of the land or any particular interest therein?]

Each shareholder takes his proportion of the annual profit of the land employed. If the aggregate of the interests of all the shareholders were vested in one person, instead of in a large number, there would be no doubt that a bequest to charity of the whole interest would be void. Whether he is debarred by contract or otherwise, from realising the real estate employed in the concern, does not affect the question, for, until realised, his share of the annual profits still remains "an interest in land," and is within the express terms of the statute.

(a) 9 B. & Cr. p. 494.

(b) Unreported, and see *Flint v. Warren*, 14 Sim. 554.

1846.  
SPARLING  
v.  
PARKER.

The authorities strongly support the view of the Defendants. It has been held that turnpike tolls are within the act: *Knapp v. Williams*. (a) So, a share in the Bath Navigation (b); so money secured on poor and county rates; *Finch v. Squire* (c); and, again, a vendor's lien upon an estate for the purchase money, *Harrison v. Harrison* (d); and in *Negus v. Coulter* (e), which is very applicable, it was held that the profit arising from mooring chains in the river Thames was within the Mortmain Act.

Avon shares have been held to be real estate and subject to dower, *Buckeridge v. Ingram* (g), and parish bonds given and secured on parish rates, have been held to be an interest in land: *The King v. Bates*. (h)

*Ex parte Lancaster* (i), *Bradley v. Holdsworth* (k), *Baxter v. Brown* (l), *Attorney General v. Mangles* (m), were also cited.

Mr. Tinney and Mr. R. Perry referred to the 38 G. 3. c. 60. s. 99., enacting that the land tax when redeemed "should be deemed personal estate and transmissible as such, and not of the nature of real estate," yet land tax was within the Mortmain Act.

Mr. Turner in reply.

The MASTER of the ROLLS deferred his judgment.

The

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|------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|
| (a) 4 Ves. 430. n.                                                                       | (h) 3 Price, 341., and so the rates and duties to be levied for the Liverpool Docks. <i>The King v. Winstanley</i> , 8 Price, 180. |
| (b) <i>Howse v. Chapman</i> , 4 Ves. p. 542.                                             | (i) 1 D. & Chitty, 411.                                                                                                            |
| (c) 10 Ves. 41.                                                                          | (k) 3 Mee. & W. 422.                                                                                                               |
| (d) 1 R. & M. 71., and 1 Tambl. 273.; and see <i>Collinson v. Pater</i> , 2 R. & M. 342. | (l) 7 Man. & Gr. 198.                                                                                                              |
| (e) <i>Ambler</i> , 367.                                                                 | (m) 5 Mee. & W. 120.                                                                                                               |
| (g) 2 Ves. jun. 652.                                                                     |                                                                                                                                    |

*The MASTER of the ROLLS.*

1846.

SPARLING  
v.  
PARKER.

It is admitted, that the *Scotch* railway shares do not fall within the provisions of the Mortmain Acts, but with respect to the shares in the *Liverpool* Gas Light Company, in the *Lancaster* Gas Light Company, and the *Harrington* Dock Company, a question is made, whether they are interests in land, such as to make them inapplicable to charity under the statute.

Each of these companies (and the *Harrington* Dock Company to a very large extent) is possessed of and entitled to real estate as part of its joint stock or capital; and each shareholder has an interest in an undivided portion of the aggregate capital, and some interest in the real estate which constituted part of that aggregate; *i. e.* an interest that so much of the joint stock as consisted of land should be employed for the best advantage of the joint concern, and an interest in the clear produce which might arise from a sale of the joint stock, including the land, in case the joint concern should be determined, and the affairs thereof wound up and settled.

The question is, whether this is such an interest in land as was contemplated by, or is within the true intent and meaning of the third section of the statute 9 G. 2. c. 36. Is it an estate or interest in land which can be brought into Mortmain?

A shareholder in one of these companies, whether incorporated or not, has a right to receive the dividends payable on his share; *i. e.* a right to his just proportion of the profits arising from the employment of the joint stock, consisting partly of land; and he has also a right to assign his share for value; but whilst he continues to hold



1846.  
 SPARLING  
 v.  
 PARKER.

hold his shares, he has no interest or separate right to the land, or any part of it. He is, indeed, interested in the employment of the land, but he cannot proceed against the land directly, for any thing which is due to him, or make any part of the land his own, for the purpose of satisfying any demand which he may have as shareholder. He is not in the situation of a mortgagee who has a direct interest in the land, which he may make absolutely his own by foreclosure, or of a tenant in common, or joint tenant, who may make a part of it his own in severalty; and if, upon a dissolution or determination of the joint concern, he can become an owner of any part of the land, it is only upon a new transaction, and by acquiring a new title as purchaser. Upon his death, nothing descends upon his heir, and his legal personal representatives do not acquire any share or interest in the land different from that which the deceased shareholder possessed; and in the administration of estates of deceased persons, and the investment of money to be held on trust, the shares which the deceased persons may have been possessed of in joint stock companies, ought, in the absence of special directions or circumstances, to be sold and converted into money to be otherwise invested.

The Courts have held, that if a man directs land to be sold, and the produce applied, either by itself or a part of a mixed fund, in payment of legacies to charities, the legacies so far as their payment is made to depend on the produce of the real estate, must fail, as being contrary to the intent and policy of the Mortmain Act, and marshalling is not allowed. But, no case has determined, that such shares as those now in question, are within the meaning of the act; and on the whole, I am of opinion, that a shareholder in such joint stock companies as those which are now under my consideration,

is

is not in that character or right, entitled to any such estate or interest in land, as falls within the true intent and meaning, and the operation of the Mortmain Act of *George II.*

1846.  
SPARLING  
v.  
PARKER.

If the company continues, the share is transferable only for money. If the company be dissolved, the whole property is sold, the concern is wound up, and the shareholder obtains only his share of any surplus, which there may be after satisfying all demands on the joint concern.

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NOTE. — In *Hilton v. Giraud*, 26th March 1847, V. C. Knight Bruce held, that shares in the *London Dock Company*, and the *West India Dock Company*, were not within the Mortmain Act.

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TOMLINSON v. TOMLINSON. (a)

1823.  
July 22.

IN this case, the testator, by his will, gave the rest of his estate to one for life, and after his decease to trustees “upon trust to transfer so much of his canal shares to the overseers of the poor of *All Saints*, in the county of *Derby*, as would raise ten guineas per annum, to be paid to ten poor housekeepers on *St. Thomas’s-day*, to purchase meat and pudding for *Christmas-day* annual.” He also made other charitable bequests to schools and an infirmary, which he directed to be paid out of his canal shares.

Canal shares, which, by act of parliament, were declared to be personal estate, and transmissible as such; Held, by Sir John Leach, to be within the Mortmain Act.

The

(a) I am indebted to the kindness of my friend Mr. Lewin for a note of this decision, which, however, was not referred to in the argument of the former case. — C. B.

1823.  
 TOMLINSON  
 v.  
 TOMLINSON.

The testator died in 1819, having shares in the *Wisbeach*, *Shrewsbury*, and the *Birmingham and Worcester* canals. The *Wisbeach* canal was made under the authority of an act of the 34 G. 3., whereby the proprietors of shares were incorporated, and authorised to purchase lands and make the canal, and raise money for that purpose, the amount of which was to be divided into shares; and it was declared "that the said shares should be deemed *personal estate*, and should be transmissible as such, and that the said shares should be, and they were thereby, vested in the several subscribers, and their several and respective successors, executors, administrators, and assigns, to their and every of their proper uses;" and it was declared, that the subscribers should be entitled to receive "the entire and net distribution of a proportionable part of the profits and advantages that should or might arise and accrue."

The *Shrewsbury* canal was made under the authority of an act of the 33 G. 3., and the *Birmingham and Worcester* under an act of the 31 G. 3. These acts were to a similar effect.

This bill was filed by one of the residuary legatees against the executors and the Attorney-General, insisting on the invalidity of the charitable bequests.

The cause came on for further directions on the Master's report.

Mr. *Agar* and Mr. *Lovat*, for the Plaintiff.

Mr. *Wingfield* and Mr. *Phillimore*, for the Defendants,  
 and

Mr. *Glynn*, for the Attorney-General.

Sir

Sir *John Leach* by his decree declared, that the charitable bequests which were, by the said will, directed to be paid out of the said testator's canal shares were all void, being contrary to the Statute of Mortmain (*a*).

1823.  
TOMLINSON  
v.  
TOMLINSON.

(*a*) *Reg. Lib.* 1822. *B.* fol. 1974.

SCHNEIDER v. LIZARDI.

1846.  
June  
10. 25, 26.

**T**HIS case came on upon demurrer. The bill was filed by *John Schneider*, *Henry Schneider*, and *Thomas Murphy*, the latter being described as the "Minister Plenipotentiary of the Supreme Government of the Republic of the United States of *Mexico*," against *Helena Lizardi* and *Manuel Lizardi*.

The bill stated, that previous to the 5th of *April* 1845, "the firm of *Francisco Lizardi & Co.* of &c. (which then was and has ever since, and now is represented by *Helena Lizardi*), were the agents in this country for the aforesaid Republic of the United States of *Mexico*." It alleged, that *Francisco Lizardi & Co.*, as such agents, had delivered to them by the then *Chargé d'Affaires* for the said Republic in *London*, papers, documents, and certain deferred bonds. That "the said Re-

A Plaintiff having a demand against a firm of *Francisco Lizardi and Co.*, filed a bill against *Helena Lizardi*, alleging that the firm was "represented by her." A demurrer was allowed.

A demurrer allowed to a bill filed by the agent duly authorized, and minister plenipotentiary of a foreign state, in respect of rights of such public,

state, on the ground that the state was not properly represented.

Upon the allowance of a demurrer, the question of costs and liberty to amend are in the discretion of the Court; and for the purpose of determining them, the Court, to some extent, has regard to the statements in the bill, though admitted only for the purposes of the demurrer.

The allowance of a demurrer to the whole bill puts an end to an injunction, though liberty is given to amend.

1846.  
  
 SCHNEIDER  
 v.  
 LIZARDI.

public, or the government of the Republic of *Mexico*, being dissatisfied with them, the minister of finance of the said Republic, duly authorised for that purpose, had determined the agency of the firm, and had notified them, that all funds and monies, with all documents and papers in their hands, should be handed over to the Plaintiffs, the *Schneiders*, immediately. The bill set out a document, dated the 5th of *April* 1845, whereby the minister of finance (alleged to be duly authorised for that purpose by the government of the said Republic) appointed the Plaintiffs, *John* and *Henry Schneider*, the agents, in *London*, of the Republic, and directed them "to proceed to receive from Messrs. *Lizardi & Co.*, the funds which were in their possession, as well as all papers and other documents belonging to the said Republic."

The bill set out a correspondence between the Plaintiffs, the *Schneiders* and *Lizardi & Co.*, the letters of the latter being alleged to have been signed by *Manuel Lizardi*, as holding the procuration of and for, and on behalf of, the said firm of *Francisco Lizardi & Co.*; and it also set forth a correspondence between the Plaintiffs, the *Schneiders*, with the Plaintiff *Murphy*, "on behalf of, and as the representative of the said supreme government."

The bill alleged in substance, that Messrs. *F. Lizardi & Co.* refused to deliver up the papers, documents, and bonds; and the bill contained the following charges:—  
 "That although the Defendant, *Helena Lizardi*, alone represents the said firm of *Francisco de Lizardi & Co.*, the whole business of the said firm is, and has been, prior to and ever since the said 5th of *April* 1845, managed and transacted by the said *Manuel Lizardi*, who holds the *procuration* of the said firm. That the whole

whole of the transactions aforesaid were conducted by the said last-named Defendant, and that the said last-named Defendant has a considerable interest or share in the said partnership firm, and is a necessary party to this suit."

1846.  
  
 SCHNEIDER  
 v.  
 LIZARDI.

It charged, that the Plaintiffs, *John Henry Schneider* and *Henry Schneider*, had been duly and properly appointed, according to the law and constitution of the Republic of *Mexico*, to be agents of the said Republic, for the purpose of receiving from the said firm of *F. Lizardi & Co.*, the said deferred bonds, and the aforesaid several papers and documents, now in the possession of the said last-mentioned firm, relating to the said agency;" and it charged that the Defendants had frequently so admitted.

It "charged that the Plaintiffs, *J. Schneider* and *Henry Schneider*, were, as such agents, fully authorised and deputed by the said *Mexican* government to recover such bonds, papers, and documents, on behalf of the said government; and that the last-named Plaintiffs, together with the Plaintiff *Thomas Murphy*, as such Minister Plenipotentiary of the said Republic, were fully authorised, and were alone entitled to represent, and do, in all things represent, the said Republic in this country."

It charged, that although the said bonds were left in the hands of the said *F. Lizardi & Co.* under the circumstances aforesaid, and as an indemnity to the said government against their being put into circulation, the Plaintiffs within the last few days heard it currently reported in the city, and believed the same to be true, that the said firm of *F. de Lizardi & Co.* had lately been selling deferred bonds of the said government.

It

1846.  
 SCHNEIDER  
 v.  
 LIZARDI.

It "charged that the Plaintiffs were unable to take any proceedings at law against the Defendants, inasmuch as they were unable to discover, and the Defendants refused to set forth, the numbers, marks, dates, and amounts, or other particulars of the said deferred bonds."

The bill prayed, that the Defendants might be decreed to deliver up to the Plaintiffs all the aforesaid papers, documents, and deferred bonds, and for an injunction to restrain their selling or parting with them.

Upon the filing of the bill a special injunction had been granted. The two Defendants afterwards put in separate demurrers to this bill, first for want of equity, and secondly, because "the person or persons exercising the powers of government, in and for the Republic of the United States of *Mexico*," had not been made parties.

Mr. Tinney, Mr. Roupell, and Mr. Heathfield, in support of the demurrers, contended, that Messrs. Schneider were mere agents of the parties entitled, and could neither sue alone, nor be joined as co-plaintiffs, *The King of Spain v. Machado* (a); and as to the Plaintiff Murphy, that he had no right, as ambassador, to sue, for he represented the government merely in a diplomatic capacity, *Hullett v. The King of Spain* (b), *Don Diego de Acuna* (*The Spanish ambassador*) v. *Bingley*. (c) In the former case it was held, as quite clear, that a foreign sovereign must sue in his own name; and in the latter it was held, that an ambassador cannot sue for his sovereign, and that a procurator must sue in the name of his principal.

(a) 4 *Russ.* 225.

(b) 2 *Bli.* (N. S.) 31, and 1  
*Dow & Cl.* 169.

(c) *Hobart*, 113.

That

That as to the Defendant *Helena Lizardi*, the statement that she "represented" the firm, was an insufficient allegation to charge her; and as to the other Defendant, *Manuel Lizardi*, that the effect of the statements was, that he was a mere clerk in the concern, and, "holding the procuration for the said firm," he had no power over the documents, and for the purposes of the discovery might be a witness, and that, therefore, he had improperly been made a party.

1846.  
  
 SCHNEIDER  
 v.  
 LIZARDI.

That the government of *Mexico* was not properly represented on this record.

Mr. Kindersley, Mr. Turner, and Mr. Hetherington, in support of the bill, contended, that it was quite settled that the king of another country or a foreign state was entitled to sue in this Court; but that a foreign state "must sue in the names of some public officers who were entitled to represent the interests of the state:" *The Colombian Government v. Rothschild*. (a) That here, there was a sufficient allegation that Messrs. *Schneider* were duly appointed, according to the law of *Mexico*, "agents for the purpose of recovering the bonds," &c. &c. and that they and *Murphy* "were fully authorised, and were alone entitled, to represent, and did, in all things, represent, the said republic in this country;" and that the Court must, on such allegation, conclude, that they had been duly appointed by some valid act of the *Mexican* government, and were entitled to sue and properly represented the government of *Mexico*. That there was a sufficient allegation of interest in *Helena Lizardi* to make her a necessary and proper party; and that it was distinctly charged, that *Manuel Lazard* "had a considerable interest or share in the said partnership firm."

*Ogden*

(a) 1 *Simons*, p. 104.



1846.  
  
 SCHNEIDER  
 v.  
 LIZARDI.

*Ogden v. Folliott* (a): *The Duke of Brunswick v. The King of Hanover* (b), *Dolder v. Huntingfield* (c), *The Nabob of the Carnatic v. The East India Company* (d), and *The Queen of Portugal v. Glyn* (e), were also cited.

Mr. *Tinney* replied, and, at the conclusion of his reply,

*The MASTER of the ROLLS* said, I think the demurrers must be allowed; but the Defendants must make out that they are entitled to the costs.

Mr. *Tinney*. It is almost of course, that a Defendant, who has been improperly sued, should have the costs of the proceeding. The Plaintiffs cannot rely on the statements in the bill, none of which are proved or admitted: they may be mere fiction, and the rumours alluded to in the bill must be disregarded. The point that a minister plenipotentiary cannot sue has been settled so long back as the time of *Hobart*. The Defendants by demurring have prevented a great deal of useless expense to the parties.

*The MASTER of the ROLLS.*

I am of opinion that these demurrers must be allowed. I think that the bill is improperly constituted, because it does not make the *Mexican* government a party, although the property is, as it appears to me, clearly alleged to belong to that government. I think, also, that the bill is defective, in stating that the Defendant is a representative of a firm, and no more. I cannot concur in the argument addressed to me, that the mere  
 allegation

(a) 3 *Term R.* p. 731.

(b) 6 *Beavan*, 1.

(c) 11 *Ves.* 283.

(d) 1 *Ves.* jun. 371.

(e) 7 *Cl. & Fin.* 466.

allegation of being the representative, is enough to admit the proof of those circumstances which would shew that the party is not only a representative, but is the party actually carrying on the business.

1846.  
  
 SCHNEIDER  
 v.  
 LIZARDI.

With regard to *Manuel*, he is, I think, though not very correctly and distinctly, yet sufficiently alleged to have a considerable interest in the firm. I do not say that it is properly or well alleged, but I think it is sufficiently alleged, that he is not a mere "procurator," as he has been called. I think, that the demurrer must be allowed.

There is such a colour of equity on the face of the bill, that I think I ought to give leave to amend. The question then is, what is to be done with regard to the costs. The general order of the Court gives the costs in favour of the demurring party (a); but to call it a right, when the very same order makes it subject to the discretion of the Court, is something singular.

In all cases of demurrer the Court does take into its consideration the question of costs; and to suppose that I cannot interpose in respect of costs, in this case, without founding my decision upon the allegation of the rumours in the city of *London*, has surprised me. The Court, notwithstanding the facts rest upon allegation and are admitted only for the purpose of the demurrer, will and does daily take into consideration the nature of the case, for the purpose of considering, first, whether there ought to be any direction at all as to costs, and, in the next place, for the purpose of considering whether any leave ought to be given to amend.

I remember

(a) 31st Order of April 1828, *Ord. Can.* 17.

H h 2

1846.  
  
 SCHNEIDER  
 v.  
 LIZARDI.

I remember cases (a) where leave given to amend has been a matter of very serious consideration, and, after determination here, they have been carried elsewhere, and it has been held, that giving liberty to amend is a matter entirely in the discretion of the Court, to be determined upon the facts appearing before it, upon the allegations in the bill, the limited admissions on the demurrer, and the nature and probability of the case. I think that the justice of this case does require that leave should be given to amend. It does not follow that the costs are to be given to the demurring party. Having regard to the nature and the circumstances of this case, and to what I must know, notwithstanding it comes on upon demurrer, I think it is not quite clear what ought ultimately to be done with regard to the costs of this demurrer, and I shall therefore reserve them till the hearing of this cause.

The allowance of a general demurrer puts an end to an injunction in the cause, though liberty be given to amend.

The order I make is to allow this demurrer, to reserve the costs till the hearing, and give the Plaintiffs leave to amend their bill. They must amend within a limited time, and, if not, they must pay the costs of the demurrer and of the suit also. There is an injunction, that is gone, the allowance of the demurrer to the whole bill puts an end to it. (b)

(a) *Tyler v. Bell*, 1 *Keen*, 826., 354., *Hinde's Pr.* 598., *Harrison's Pr.* 548., *Wy. Pr. Reg.* 233.  
 2 *Myl. & Cr.* 89., and *Wellesley v. Wellesley*, 4 *Myl. & Cr.* 558. 243.  
 (b) *Newland's Pr.* (3d ed),

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NOTE. — The bill was, on the 29th of June 1846, dismissed with costs, and another bill filed.

1846.

*In re* The FORTH Marine Insurance Company, and  
an Act of Parliament of the 7 & 8 *Vict. c. 111.*

June 29.  
Sept. 23.

**T**HIS was a petition under the 7 & 8 *Vict. c. 111.* s. 2., and, being the first application under that act, it underwent much consideration. The facts are short. The company was established on the terms of a deed dated the 17th of *April* 1839, and, by an act of the 5 & 6 *Vict. c. xcix.*, it was enabled to sue and be sued.

Form of reference under the 7 & 8 *Vict. c. 111.*, in the case of a bankrupt joint stock company.

Its business of insurance turned out most disastrous; the company became insolvent, and the deficiency of its assets was estimated at 30,000*l.* On the 2d of *July* 1845, a fiat of bankruptcy issued against it, under which the company was declared bankrupt, and assignees were appointed.

By an order of the commissioner under the *fiat*, it was ordered, that, pursuant to the authority given by the 7 & 8 *Vict. c. 111.*, the assignees should apply to this Court by petition, in a summary way, praying, that all such orders and directions might be given, as should be necessary, for the final winding up and settling the affairs of the said company, and to compel a just contribution, from all the members of the said company, towards the full payment of all the debts and liabilities of the said company, and of the costs of winding up and finally settling its affairs.

The petition was accordingly presented, and the petitioners, after thereby stating the facts, proceeded

*H h 3*

as

1846.

*In re*  
The FORTH  
Marine In-  
surance Com-  
pany.

as follows:—“That your Petitioners are advised and humbly submit, that in order duly to wind up and settle the affairs of the said company, and to compel such just contribution as aforesaid, it will be necessary, or at all events desirable, that the orders and directions to be made and given, pursuant to the said act, should contain, in detail, directions and provision for ascertaining the total number of shares in the said company and of the shareholders therein, and of the persons who now constitute such shareholders, and the number of shares held by each shareholder, and also for ascertaining the amount due from each shareholder to make good the amount now required to satisfy the outstanding debts and liabilities of the company, having regard to the extent and proportion of each shareholder's interest in the said company, and to the several payments previously made by each shareholder, respectively, on account of the company.”

The petition prayed, that all necessary orders and directions might be given, for the final winding up and settling the affairs of the company, and to compel a just contribution from all the members of the said company, towards the full payment of all the debts and liabilities of such company, and of the costs of winding up and finally settling the affairs of the said company; and, if the Court should think fit, that it might be referred to one of the Masters to take all such accounts and make all such enquiries, as should be required, for the purpose of ascertaining what sum of money, in the whole or what sum or sums of money, from time to time, account, would (having regard to the deed of settlement of the said company, and the calls, contributions, and demands actually paid by the several and respective members thereof, and also having regard to the proceedings in the said court of bankruptcy,) be necessary and proper to be raised by calls or contribution:

respective members of the said company, for the  
ent and satisfaction of all the debts and liabilities  
ch company: and also of all the costs of winding  
and settling the affairs of the said company." (a)

Mr.

1846.

*In re*  
The FORTH  
Marine In-  
surance Com-  
pany.

The act in question (7 &  
c. 111.) is intituled, "An  
act facilitating the winding  
up of Affairs of Joint Stock  
Companies unable to meet their  
mutual Engagements."

sections relating to the  
of this application are  
b, 21st, and 22d.

20. "And be it enacted,  
shall be lawful for the  
authorised to act in the  
execution of any such fiat in  
bankruptcy, to direct the credi-  
tors of the estate and  
of any such company or  
body to apply to the High Court  
of Chancery by petition, in a sum-  
mary, to the Lord Chancellor  
or Master of the Rolls, praying  
such orders and directions  
given, as shall be neces-  
sary for the final winding up and  
settling the affairs of such com-  
pany or body, and to compel a  
contribution from all the  
creditors of such company or  
body towards the full payment  
of the debts and liabilities of  
such company or body, and of the  
costs of winding up and finally  
settling the affairs of such com-  
pany or body; and that upon  
the filing of such petition, it  
shall be lawful for the said High  
Court of Chancery to refer it to  
the Masters of the High  
Court of Chancery to take all  
accounts, and make all such

enquiries, as shall be required for  
the purpose of ascertaining what  
sum of money, in the whole, and  
what sums of money, as propor-  
tionate parts of the whole, or  
what sum or sums of money,  
from time to time, on account,  
will (having regard to the deed  
of settlement of such company,  
and the calls, contributions, debts,  
or demands actually paid by the  
several and respective members  
thereof; and also having regard  
to any proceedings in the court  
of bankruptcy, or any district  
court of bankruptcy,) be neces-  
sary and proper to be raised, by  
calls or contributions from the  
respective members of such com-  
pany or body, for the payment  
and satisfaction of all the debts  
and liabilities of such company  
or body, and also all the costs  
of winding up and settling the  
affairs of the said company; and  
that the High Court of Chancery,  
upon confirmation of the Master's  
report made upon any such re-  
ference or upon making such  
reference or otherwise, may or-  
der the payment of the several  
and respective sums of money,  
which, by such report, are found  
necessary and proper to be paid,  
and may refer it to the Master  
to appoint a Receiver to collect  
and receive such sums of money,  
and either to pay the same into  
the Bank of England, in the name  
and to the account of the Ac-

1846.

*In re*  
The FORTH  
Marine In-  
surance Com-  
pany.

Mr. *Roll* in support of the petition.

The MASTER of the ROLLS said, that this, being the first application, required great consideration, and the th.

countant General of the High Court of Chancery, to the credit of such company or body, and may, upon the petition of such assignees, order such sums of money to be paid, in or towards satisfaction of the debts, which, by the proceedings in bankruptcy, shall have been found to be due to the creditors of such company or body, and all persons having claims and demands thereon, and also in satisfaction of costs, or may order such Receiver to pay such sums of money in satisfaction of such debts, claims, and demands, and costs in the first instance."

Sect. 21. "And be it enacted, that if it shall appear, that any individual members of such company or body have claims against each other in respect of the affairs or transactions of such company or body, it shall be lawful for the Court of Chancery, upon the petition of any member of such company or body, alleging that he hath any such claim against any other member of the said company or body, to make all such orders as shall be just, for the purpose of finally settling and determining such claim, and may order the payment of such sum of money (if any) as shall appear to be due in respect of any such claim."

Sect. 22. "And whereas the

law is defective in the means of making the members of joint stock companies contributaries for paying their debts in full, and in the means of giving relief, where execution may have been had in respect of debt due from any such company, against one or a very few members of such company, and also in the means of adjusting the rights of the members of such company amongst themselves, and finally winding up the affairs of such company, be it enacted, that it shall be lawful for the Lord Chancellor, with the advice and consent of the Master of the Rolls and the Vice-Chancellors for the time being, or any two of them, from time to time and as often as circumstances shall require, to make and prescribe such rules and orders, touching and concerning the form and mode of proceeding to be had and taken in the Court of Chancery for settling and enforcing the contribution to be paid by any member or members for the time being of any such company, or any former member or members thereof, or any real or personal representative or other persons liable in that behalf, and the practice to be observed by such Court in or relating to such proceeding, or any matters incident thereto,

the Court would anxiously attend to any suggestion of the Petitioners, as to the proper form of order to be made. That one of the difficulties was, that the Petitioners had no one present to contend with, and that the individual shareholders were not represented.

1846.  
  
*In re*  
 The FORTH  
 Marine In-  
 surance Com-  
 pany.

That it would seem, that the debts, assets, and the shareholders in the Company, and the extent of the liability of each shareholder to contribute, must, in some way or other be ascertained; but that he doubted whether the Court had, at present, power to wind up the concern except as between the company and its creditors.

*Mr. Rolt.* The debts and assets have already been ascertained in the bankruptcy: it will, therefore, be sufficient to have regard to those proceedings in the enquiry before the Master.

*The MASTER of the ROLLS.*

The case had better stand over for further consideration. How are the alleged shareholders to be charged their

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and the form and mode of proceeding to be had and taken before anyone of the Masters of the said Court, primarily or by reference from the said Court, in any matter for or relating to contribution, as shall, from time to time, seem necessary and proper for the advancement of justice in such cases and for adjusting and determining the rights and equities of the parties concerned, and for suing for and getting in the assets, and for ascertaining and discharging the liabilities of such companies, and requiring the creditors thereof to claim their debts and finally winding

up the affairs thereof, with as little delay, expense, and uncertainty as possible: Provided always, that such rules and orders shall be laid before both houses of parliament, within one month from the making thereof, if parliament be then sitting, or if parliament be not then sitting, within one month from the commencement of the then next session of parliament, and every rule and order so made shall be binding and obligatory, and be of like force and effect, as if the provisions contained therein had been expressly enacted by parliament."



1846.

*In re*  
The FORTH  
Marine In-  
surance Com-  
pany.

in their absence—how are they to know from whom they are entitled to contribution, or with whom they are in competition or conflict? Some opportunity must be given them to contest their liability.

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The case stood over, but, ultimately, on the 23d September, 1846, the following order was made:—

His Lordship doth order, that it be referred to the Master &c., to enquire &c., what sum of money in the whole, and what sums of money as proportionate parts of the whole, or what sum or sums of money, from time to time, on account, will (having regard to the deed of settlement of the said company, and the calls, contributions, debts, or demands actually paid by the several and respective members thereof, and also having regard to any proceedings in the Court of bankruptcy, or any district Court of bankruptcy,) be necessary, and proper to be raised, by calls or contributions, from the respective members of the said company, for the payment and satisfaction of all the debts and liabilities of the said company, and also of all the costs of winding up and settling the affairs of the said company. And in order thereto, the parties are to produce before the said Master upon oath all deeds &c., and are to be examined upon interrogatories, as the said Master shall direct. And the said Master is to cause a list to be made of the names of the several persons whom he shall find to be shareholders of or in the said company, and of the number of shares held by or ascribed or attributed to them respectively. And he is to cause an advertisement to be published in the *London Gazette* and such other public papers as he shall think proper, setting forth a copy of the said list, and giving notice, that the shareholders therein named are, if they think fit, to come in before him and dispute their liability in respect of

of their shares respectively; and the said Master is to fix a peremptory day for that purpose; and that, in default of their coming in to dispute their liability, as aforesaid, by the time so to be limited, each of such shareholders will be held liable in respect of such shares respectively, and a copy of such notice is also to be served upon each of the said shareholders. And in case any of them shall come in before the said Master to dispute their liability as aforesaid, the said Master is to appoint a time for the consideration thereof, and for such shareholders respectively, to shew cause against their names being included in the said list. And the said Master is to be at liberty to enlarge such time as he shall see fit; and he is also to be at liberty, after the expiration of the time for shewing such cause, to make a separate report or separate reports from time to time, as to any of the persons whom he shall find to be shareholders, and of the shares attributable to them respectively, and of the amount payable by any of them. And the said Master is also to be at liberty to state any circumstances relating to the matters aforesaid specially, as he shall think fit. And in case of any difficulty arising in the prosecution of this order, the Master is to certify the same to the Court, and thereupon such further order shall be made as the case may require. And any of the said shareholders are to be at liberty to except to the Master's general report, or to any separate report which he may make in pursuance of this order. And they and the petitioners are to be at liberty to apply to this Court as they may be advised, whereupon such further order shall be made as shall be just.

1846.  
  
*In re*  
**The FORTH**  
**Marine In-**  
**surance Com-**  
**pany.**

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**NOTE.** — The advertisements issued by the Master were in the following form : —

PURSUANT to an order of the High Court of Chancery, made *in the matter of the Forth Marine Insurance Company*, and in the matter

1846.  
  
*In re*  
 The FORTH  
 Marine In-  
 surance Com-  
 pany.

of an Act of Parliament, made in the 7th and 8th years of the reign of our Sovereign Lady, the Queen Victoria, intituled, "An Act for facilitating the winding up the Affairs of Joint Stock Companies, unable to meet their pecuniary Engagements," Sir *William Horne* Knight, one of the Masters of the said Court, to whom the matter of the said order stands referred, hath caused the subjoined list to be made of the names of the several persons whom he hath found to be shareholders of or in the said Company, and of the number of shares held by, or ascribed, or attributed to them respectively. And the shareholders in the said list named are, if they think fit, on or before the 16th day of *March* next, to come in before the said Master, at his chambers in *Southampton Buildings, Chancery Lane, London*, and dispute their liability in respect of their shares, respectively, and in default of their coming in to dispute their liability as aforesaid, by the time so limited, each of such shareholders will be held liable, in respect of such shares, respectively.

## The SCHEDULE.

| Names and Descriptions of the present Shareholders of the<br>Forth Marine Insurance Company.                                                                        | Number of Shares<br>held by, or ascribed,<br>or attributed to<br>them respectively. |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|
| 1. John Armstrong, merchant, Leith, in the county<br>of Edinburgh - - - - -                                                                                         | 25                                                                                  |
| 2. Richard Alexander, and James Alexander, his<br>son, merchants, Edinburgh, carrying on business<br>in the style or firm of Richard Alexander and<br>Son - - - - - | 20                                                                                  |
| 3      &c      &c.      -      -      -      -                                                                                                                      | &c.      &c.                                                                        |
| Total number of shares - - -                                                                                                                                        | 2338                                                                                |

1846.

## WHITCHER v. PENLEY.

July 13.

**T**HE question arose on a residuary gift.


The testator bequeathed the residue to his three sons, in trust to provide an annuity of 52*l.* for his housekeeper for life, and continued, "this sum I wish to be secured, and at her death to go to my son *William*, or *his children*. The overplus of the last-mentioned property I leave to be divided between my said three sons and my daughter, or their children; my daughter's share to be kept in the hands of my said three sons, for her or her children's sole use, and free from the controul of her husband."

A testator bequeathed his residue to his three sons, in trust, to be divided between his three sons and his daughter, and he directed his daughter's share to be kept in the hands of his sons, for her "or" her children's sole use, free from the controul of her husband. The daughter survived. Held, that she took absolutely.

There were other parts of the will which, in argument, were relied on, as affecting the construction of the residuary gift. Thus, the testator gave to his son *George* some leasehold property, and proceeded:—"this property I earnestly entreat my son *George*, should he die without issue, to settle upon his brothers and sister, or their children."

He then proceeded: "I likewise give and bequeath to my said three sons *William*, *George*, and *Aaron Penley*, in trust for my daughter *Frances Mary Ann Astor*, for her sole and separate use, free from the controul, debts or incumbrances of her husband, and at her demise, for the benefit of her children, a leasehold house," &c., which he then described.

The

1846.  
  
 WHITCHER  
 v.  
 PENLEY.

The testator died in 1838, and his daughter died in the year following, leaving several children, who were Plaintiffs in the cause. The Defendant *Reynell* was her administratrix.

The question was, whether, on the construction of the residuary clause, the daughter took absolutely, or whether her children took any interest in the gift.

Mr. *Turner* and Mr. *Rogers*, for the children, contended, that, under the gift *to the daughter or her children*, the daughter took for life, with remainder to her children, as in *Newman v. Nightingale (a)*, where, under a gift to the sole use of *N. or her children*, it was held, that *N.* took for life, with remainder to her children. So in *Vaughan v. The Marquis of Headfort (b)*, where a legacy was given to *A.* and his children, to be settled for their benefit, it was held, that *A.* took for life, with remainder to his children.

Secondly, that if “or” were construed “and,” which was frequently done, the children would take absolute interests concurrently with their parent.

Mr. *Kindersley* and Mr. *Bird*, *contra*. The daughter took an absolute interest, and the children could only take by substitution. In *Jones v. Torin (c)*, under a gift to “children or their descendants,” it was held, that the children took absolutely. In *Gittings v. M'Dermott (d)*, a gift to *A., B., C. and D., &c.* “or to their heirs,” was so construed, that children of *A.* who died in the testator's lifetime took by way of substitution.

Again,

(a) 1 *Cox*, 341.

(b) 10 *Simons*, 639.

(c) 6 *Sim.* 255.

(d) 2 *Myl. & K.* 69.

Again, in *Montagu v. Nucella* (a) the gift was to nephews or their respective children, and nephews who survived the testator were held to take absolutely. The same principle has been recently acted on in *Salisbury v. Petty*. (b)

1846.  
WHITCHER  
v.  
PENLEY.

Mr. Turner in reply.

The MASTER of the ROLLS was of opinion that the daughter took an absolute interest in one-fourth of the residue, and he made a declaration accordingly.

(a) 1 Russ. 165.

(b) 3 Hare, 86.

HEDGES v. HARPUR.

Feb. 18.  
July 13.

THE testator, *Thomas Fentham*, by his will, dated in 1808, gave his real and personal estate to trustees and their heirs, &c. upon trusts, which he declared in the following words : —

A testator gave fourteen *Phoenix* shares, on trust to pay the produce of ten to his daughters for life, and after-

“ As

wards to his son, and afterwards to the son’s “children ;” and he gave the other four shares to his son for life, and afterwards to his “children,” and, in default of “such issue” of his son, he gave all the shares to his “daughters” and their “issue,” share and share alike, such issue not to be entitled to or take more than their deceased parent’s share. The son died without issue. Held, that the daughters took absolute interests, and that their children took only by way of substitution for their parents, and not by way of limitation or succession.

A testator bequeathed ten *Pelican* shares to his son “and his heirs, executors, administrators, and assigns for ever,” he paying the profits of eight to the testator’s daughters for life, and, after their decease, the daughters’ shares were to “return to his son and his issue,” and, “in default of such issue,” there was a gift over to the daughters and their “issue.” Held that, subject to the life-interest of the daughters, the son was absolutely entitled to the shares.

A testator gave to each of his five daughters 400*l.* per annum for their lives, and, after their respective deceases, he gave the same to their “children,” respectively ; and in case any of the daughters died “without issue,” the annuity to cease. Held, that the children of the daughters took for life only a proportion of the annuity.

Though the word “issue” be, in one clause of a will, construed “children,” it does not necessarily follow that it will receive the same construction in all the other clauses.

1846.

HEDGES  
v.  
HARPUR.

"As to all those fourteen shares in the *Phoenix Fire* Office, I direct my executors and trustees to pay the produce of ten shares thereof unto my said five daughters, during the term of their natural lives, that is to say, two shares to each; and after their decease, I give the same unto my said son *Thomas John Fentham*, and after his decease to his children equally, share and share alike; and as to the other four shares, I likewise give the same unto the said *Thomas John Fentham* during his life, and after his decease, I give the same to his children, share and share alike; and in default of such issue of my son, then I give all the said shares unto my said daughters and their issue, share and share alike, such issue not to be entitled or take more than their deceased parent's share.

"And as to all those my ten shares in the *Pelican Life* Office, I give the same to my son *Thomas John Fentham*, and his heirs, executors, administrators and assigns for ever, my said son paying thereout the profits of eight shares unto my said five daughters, during the term of their natural lives; and after the decease, as and when they shall respectively die, the share of her or them so dying to return to my said son and his issue; and in default of such issue of my said son, I give all the said shares to my said daughters and their issue, share and share alike.

"I also give to each of my said five daughters 400*l.* per annum, to be payable half-yearly during the term of their natural lives; and, after their respective decease, I give the same to their children respectively, share and share alike, such children not to be entitled to more than their deceased parent's share; and in case any or either of my said daughters shall die without issue, then

I direct

I direct such annuity to cease, and fall into the residue of my estate."

1846.  
HEDGES  
v.  
HARPER.

There were other passages in the testator's will, which, though not directly bearing on the above bequests, were relied on, in the argument, as to the construction of the expressions contained in the above bequests. Thus the testator devised an estate purchased from *C. E.* "unto his daughter *Charlotte* for life, and after the decease of his said daughter leaving *issue*, he gave and devised the said estate unto her *children* equally, and in default of *issue*, to his son and his heirs."

The testator also gave his residuary real and personal estate to trustees, upon trust to pay the rents &c. unto his son for life, and after his decease he gave the same equally unto the son's "children" living at his son's death, and their respective heirs and assigns, when they attained twenty-one, with a provision for maintenance and advancement in the mean time, with survivorship on the death of any under twenty-one "leaving no issue;" but, in case any such *children* so dying under twenty-one should leave any *issue*, then such issue to have his parent's share. But in case his son should die "leaving no *issue* him surviving," there was a devise to the daughters, &c.

The testator died in the year 1808, leaving his son and five daughters. The son died in 1843 without having had issue, and four of the daughters had children.

By the decree, made on the 26th of *July* 1822, the Master of the Rolls had declared, that the son was only tenant for life of the freehold and copyhold estates; and, on his death, liberty was reserved to apply to the Court.



1846.  
HEDGES  
v.  
HARPUR.

Three questions now arose; first, as to the *Phoenix* shares; secondly, as to the *Pelican* shares; and, thirdly, as to the annuities to the daughters and their children.

As to the *Phoenix* shares, it was argued, on behalf of the children of the daughters, that as, in several other clauses of the will, the word "issue" must be construed "children," *Sibley v. Perry* (a), it must receive the same construction in the gift of the *Phoenix* shares to the "daughters and their issue:" *Ridgeway v. Munikitrick* (b); and that gift would then stand, to the daughters and their "children," the "children" to take their parents' share; and that the children would take in succession or remainder after the parents' deaths. On the other hand, it was argued, for the daughters, that, although "issue" might be construed "children" in one clause, it did not follow that it must receive the same construction in a different clause in the same instrument; *Carter v. Bentall* (c); that the word issue must be construed in its ordinary sense, and thus give the daughters absolute interests, as in *Gibbs v. Tait* (d), where the gift was to the daughters of T. D. and their issue, and in *Butter v. Ommaney* (e), where the gift was to the children of A. and their issue, share and share alike. That the children must, if at all, take by way of substitution for their parents, in the event of such parents dying before the period of distribution, as held by the House of Lords in *Pearson v. Stephen* (g).

Secondly, as to the *Pelican* shares, the same argument as to "issue" being construed "children" was repeated; and it was argued, that the gift over in default

(a) 7 Ves. 522.

(b) 1 Dru. & War. 84.

(c) 2 Beavan, 551.

(d) 8 Simons, 132.

(e) 4 Russ. 70.

(g) 5 Bl. N. S. 203. and 2 Dow & Cl. 328.; and see *Dick v. Lacy*, 8 Beavan, 214.

fault of issue was valid. On the other hand, it was insisted that there was an absolute gift to the son in the first instance, with a gift over on a general failure of issue, which, being void, the son took absolutely; *Leigh v. Norbury* (a), *Chandless v. Price*. (b)

1846.  
HEDGES  
v.  
HARPUR.

Thirdly, as to the annuity, it was argued for the children, that the annuity was to cease only on a given event, namely, in case any of the daughters died without issue, and that as this event had not happened, the children were entitled to a perpetual annuity, or the fund necessary to produce it; *Robinson v. Hunt*. (c) On the other hand, it was said, that the case of *Blewitt v. Roberts* (d), over-ruling *Tweedale v. Tweedale* (e), had decided that the duration of such annuities was limited to the life of the annuitants.

The case was argued by

Mr. *Kindersley* and Mr. *Dean* for the Plaintiff, and

Mr. *Turner* and Mr. *Willcock* for the children of the daughters;

Mr. *Tinney* and Mr. *Naylor* for the representatives of the son; and,

Mr. *S. P. White* for trustees.

Mr. *Kindersley* replied.

The MASTER of the ROLLS, in substance, said, there was great difficulty in coming to a rational conclusion  
on

(a) 13 Ves. 340.

(d) Cr. & Ph. 274.

(b) 3 Ves. 99.

(e) 10 Simons, 453.

(c) 4 Beavan, 450.

## CASES IN CHANCERY.

1846.

HEDGES  
v.  
HARPUR.

on the construction to be given to the various gifts contained in this will.

That there were various clauses in the will, in which the testator had evidently used the word "issue" in the sense of "children," as in the devise to the daughter for life, and if she died leaving "issue" then to her "children;" and the first question raised was, whether the word "issue" ought to be so construed in the gift of the *Phoenix* shares to the "daughters and their issue," and then, whether the children were to take by way of limitation after the expiration of the estate for life to the daughters, or by way of substitution in case of a daughter being dead at the period of distribution. That it had not been argued that the daughters and their children took concurrently, and that it had been justly admitted, that, *prima facie*, the words, directing the issue to take their parent's shares only, imported a substitution.

That as to the *Pelican* shares, it had been argued that the same construction ought to be given to the word "issue" as in the prior gift of the *Phoenix* shares but, it appeared to him, that there were three important differences in the two bequests; for, first, the *Pelican* shares were given to the son, "his heirs, executors administrators and assigns for ever," and that it was impossible to use words more calculated to give him an absolute interest; secondly, in the gift of the same shares there was an absence of the use of the word "children" convertibly with "issue;" and, thirdly, there was an absence of the direction that the issue were to take the parent's share.

That as to the annuities, the question was as to their duration, and in that gift there appeared some confusio

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in using terms relating to the separate annuities and the aggregate gift.

1846.

HEDGES  
v.  
HARPER.

That, on the whole, his impression was, that, in the first gift, the children took by substitution; that in the second, the absolute interest given to the son had not been validly taken out of him; and, thirdly, that the annuitants were entitled to life annuities. That he would consider the clauses with the authorities, and give judgment on a future day.

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*The MASTER of the ROLLS.*

July 13.

Having given my best attention to this case, I continue to hold the opinion I expressed immediately after the hearing of the case.

It does not appear to me possible to reconcile, satisfactorily, that which appears to have been the general intention of the testator with the words which are employed on the occasion of each particular bequest. All that can be done is, to adopt such construction as seems most nearly to effect that object. And, on the whole, I think, 1st., That in the events which have happened and under the clause relating to the *Phœnix* shares, the children of the daughters take only in substitution for their parents, and not by way of limitation or succession.

2nd., That, in the events which have happened and under the clause relating to the *Pelican* shares and subject to the life interests of the daughters in eight of those shares, the son was absolutely entitled to the whole of them.

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846.  
JEDGES  
v.  
HARPER.

## CASES IN CHANCERY.

3rd., That, under the clause relating to the annuities, the children of each daughter became, each of them, entitled, for life only, to an equal share of the annuity bequeathed to their mother, and that, upon the death of each such child, the annuity of the same child is to cease, and fall into the residue.

4th., Upon the residuary clause no question is raised, and the daughters are entitled.

## TODD v. WILSON.

July 15.

On a settlement of account between a *cestui que trust* and trustee (a solicitor), the latter charged for professional services in the trust.

A release was executed, but, the *cestui que trust* not having had any independent professional assistance on the occasion, the Court relieved him from the professional charges, beyond costs out

**T**HE testator, by his will, appointed the Defendants *Wilson* and *Trotter* (a solicitor) trustees and executor. His will contained the usual trustees' indemnity clause, and it empowered the trustees to retain "all their losses, costs, charges, damages and expenses to be occasioned by the execution of the said trusts reposed in them."

The testator died in 1896, and the Plaintiff was a *cestui que trust*.

In 1840, a settlement of accounts was come to between the Plaintiff and the trustees. The Plaintiff examined and approved of the account, and signed a memorandum in the following words: — "I have examined all foregoing accounts, and have found them correct." the 16th day of December 1840, he executed to Defendants, the trustees, a general release.

The account contained the following items: —

“To cash, paid Mr. Trotter’s bill 204*l.* 6*s.* 7*d.*”

“To costs and bills relating to the Waste House trial and title, 107*l.* 11*s.* 7*d.*”

1846.  
TODD  
v.  
WILSON.

These sums appeared to be the amount of professional charges made by *Trotter*, the trustee.

Disputes afterwards arose, and this bill was filed in *May* 1845, praying that the release might be set aside, and for a general account of the trust matters. By amendment, the bill was limited to setting aside the release for the purpose of taxing the bills of costs, and for repayment to the Plaintiff of the amount retained by the trustee for his professional charges.

The Defendant, by his answer, stated, that the bills and accounts were delivered in *May* 1840, that in the settlement the Plaintiff had been assisted by his father, a barrister; but these facts had not been proved in the cause, though it appeared that the father had been a party to the release.

Mr. *Turner* and Mr. *Elderton*, for the Plaintiff, argued, that this case differed from *Stanes v. Parker* (a), for there, the *cestui que trusts* had been assisted by an independent solicitor. That it was the duty of the Defendant to have told the Plaintiff, at the time of settlement, that he was not liable beyond costs out of pocket, and that the Defendant could not avail himself of the ignorance of his client and set up the release executed without independent professional assistance, in order to retain that, which, by the law of this Court, he was not entitled to.

*The*

(a) *Ante*, p. 385.

1846.

TODD  
v.  
WILSON.

*The MASTER of the ROLLS.* In *Stanes v. Parker*, that the bill of costs had been handed over to an independent solicitor, and that makes a great difference in the two cases.

Mr. *Kindersley* and Mr. *Faber*, for the trustees, argued, that it was evident, from the nature of the transaction, the father being interested, and having executed the release, that the Plaintiff had had the benefit of his assistance in the matter; that the *cestui que trust* might, by contract, have allowed the charge, and that, after the settlement of accounts, the release, and the acquiescence of five years, the Plaintiff was not entitled to have the settlement set aside.

*The MASTER of the ROLLS.*

It seems that the Defendant *Wilson* and the Defendant *Trotter* who was a solicitor, were appointed trustees and executors of the will of the testator in this cause, who died in June 1836. *Trotter* was the acting trustee and executor, and he also acted as solicitor when the services of a solicitor were required in the execution of the trust: in other words, he was both solicitor and client; he was acting as solicitor for himself in his character of trustee. The rule of the Court on the subject is perfectly well known, that when a trustee is a solicitor and employs himself in matters relating to the trust, he is only entitled to be paid his disbursements or money out of pocket, and he is entitled to nothing for his time or professional trouble.

It is plain, however, that the Defendant *Trotter* did make such charges in his bill, and, in 1840, he came to a settlement of accounts with the Plaintiff, the person to whom the estate belonged. The accounts were rendered, and the bills of costs appear to have been delivered; but these bills do not, by any evidence before

me

me, appear to have been examined, on behalf of the Plaintiff, by any person skilled in the law, who had the opportunity of informing the Plaintiff that the solicitor, being a trustee, was not entitled to make these charges. I say, there is no evidence before me, because it is stated in the answer that these bills were examined by the Plaintiff's father, a barrister residing in the same place as *Trotter*. I cannot say that a barrister is a very good person to whom to refer bills of costs, though, as was observed in the argument, he may well know the rule and principle of this Court, that a solicitor being a trustee is not entitled to charge for his time or trouble. But, however that may be, there is no evidence that these bills were so examined by him, and, there being no evidence on the subject, I am under the necessity of saying, that I cannot consider them to have been examined by him.

1846.

TODD  
v.  
WILSON.

The accounts were settled and a release was given, and, for any thing which appears to the contrary, this gentleman, who settled the account and gave the release, did so without being advised by his solicitor, whose duty it was to advise him, that there were portions of these bills which he was not liable to pay. I consider it a general rule that the solicitor is bound to do so, if his client be without other professional assistance on the occasion.(a)

In *Stanes v. Parker*, I was of opinion, though nothing of that kind appeared to have been stated by the solicitor to the client, still that the account could not be opened, because the client had ceased to employ *Mr. Parker*, and when the release was given, he employed another solicitor, who examined the accounts  
for

(a) See *Segrave v. Kirwan*, *Beat.* 157., and *Bulkley v. Wilford*, 2 *Clark & Fin.* 102.



1846.

TODD

v.

WILSON.

*The MASTER of the ROLLS.* I . . . the rule, and to  
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Mr. *Kindersley* and . . . ed his accounts contain-  
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benefit of his

*que trust* mi . . . as imputed fraud, and sought other relief,  
and that . . . as abandoned. I am of opinion that I ought  
and th . . . so much of the bill as seeks to declare the  
entire . . . fraudulent and void, and I ought to declare,  
notwithstanding the release, the Plaintiff is entitled  
to be relieved from the charges which the Defendant  
was not entitled to make; and I must refer the bill to  
the Master, and reserve all other costs.

July 22.

## PAREDES v. LIZARDI.

The Vice-  
Chancellor,  
by permission  
of the Lord  
Chancellor,  
granted an in-  
junction in a  
cause attached  
to the Rolls'  
Court. Held,  
that the  
Master of the  
Rolls had no  
authority to  
dissolve it.

THIS cause was attached to this Court, and the  
Master of the Rolls being at the Privy Council,  
the Vice-Chancellor of *England*, by the permission of  
the Lord Chancellor, had granted an injunction.

Mr. *Tinney* now moved to dissolve it, but

*The MASTER of the ROLLS* said, that, the order having  
been made by the Vice-Chancellor of *England*, he had  
no authority to interfere with it, and he declined hear-  
ing the application.

NOTE. — See *Man v. Ricketts*, *antè*, p. 4., and the authorities there  
referred to.

1846.

SWINDELL.

June 29.

July 23.

**Giffard** applied *ex parte*, upon affidavit, for an referring the exceptions *instanter*, notwithstanding the Order of May 1845, Art. 25. (a)

the common injunction. The A reference *instanter* of exceptions in an injunction case, upon an *ex parte* motion, is regular, notwithstanding the 16th General Order of May 1845, Art. 25.

**MASTER of the ROLLS** made the order. (b)

**Roupell** now moved to discharge the order for *regularity*, as being contrary to the provision contained in the General Order referred to. July 23.

**Mr. Turner, contra**, said the order had been regularly made upon affidavit, and that it was the practice of the Vice-Chancellor of *England* to make such orders on the mere statement of counsel.

**The MASTER of the ROLLS** refused the motion with costs. He said that the Court had power, in a proper case, to dispense with the strict terms of the Order referred to; but he thought that the more correct mode of drawing up the order of the 29th of *June* would have been, to have expressed it to have been made, "notwithstanding the 16th General Order of *May* 1845, Art. 25."

(a) *Ordines Can.* 284.

(b) See *Muggeridge v. Slo-*  
*man, ante*, p. 315.

1846.  


July 27.

GLAZBROOK v. GILLATT.

The petition of a person not a party to the cause must state his residence, otherwise it cannot be heard.

A PETITION was presented by *Heirchend Sahooker*, who was not party to the cause, for a stop order, but the petition did not state his residence.

Mr. *Prior*, in support of the petition.

Mr. *Beavan* objected to the petition being heard, and he stated that the petitioner was in fact residing out of the jurisdiction.

*The MASTER of the ROLLS* considered that the hearing of the petition could not be proceeded with, until the residence of the petitioner had been stated on the petition, and he ordered it to stand over.

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Subsequently the solicitor acting for the petitioner undertook to be responsible for the costs, and the petition was then heard without further objection.

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1846.

TAPRELL v. TAYLOR.

July 6. 23. 27.

The object of this suit was to compel the Defendant to grant to the Plaintiff a lease of property, upon which the Plaintiff, on the faith of an agreement to that effect, had erected a house.

A party being in possession and enjoyment of the property in question, which was worth 140*l.*, and 10*l.* a year, dispaupered.

The Plaintiff obtained an order of course to sue *in pauperis*, upon an affidavit that he was not worth 5*l.*, save the matters in question in this suit. A writ was now made to dispauper. The affidavits as to the value of the Plaintiff's tools, furniture, &c. being 5*l.*, were conflicting; but it appeared that the Defendant was in possession of the house, and that he and his wife, and his brother-in-law and wife resided there. It appeared to be unfinished, or a carcass, and that the floors were not permanently laid down; and was shewn to be customary to sell and let carcass at what is termed a carcass rent. It appeared that the house in question was of the value of 140*l.*, and was worth to be let the annual sum of 10*l.* beyond ground-rent.

*Willcock*, in support of the motion. The Plaintiff, being in possession of the property, which is worth 140*l.* and might be let for 10*l. per annum*, is not entitled to be a person not worth 5*l.* in the world: *Spencer v. .* (a) Independently of the house, it is proved that the Plaintiff is worth more than 5*l.*

Mr.

(a) 11 *Vesey*, 49.

1846.  
 TAPRELL  
 v.  
 TAYLOR.

Mr. *E. Montagu*, *contra*. The property may be worth 140*l.*, or 10*l.* a year; but the existence of the suit prevents its being made available.

Being the subject of the suit, it properly comes within the exception: *Allen v. M<sup>c</sup>Pherson* (a): the other property of the Plaintiff is proved to be worth less than 5*l.* He also cited *Perry v. Walker*. (b)

*The MASTER of the ROLLS.*

The only thing which embarrasses me is the possession of the property. The Plaintiff is in possession of the property, which appears to be capable of being made available for profit.

Mr. *Willcock* stated that it appeared probable that the parties could arrange their differences, and the motion stood over.

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July 23.

Mr. *Willcock* observed, that the parties were unable to come to any compromise.

*The MASTER of the ROLLS.*

Hand me the affidavits; I will read them, and consider what order ought to be made.

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July 27.

*The MASTER of the ROLLS.*

I have read the affidavits, and I think I ought to discharge the order to sue as a pauper.

(a) 5 *Beavan*, p. 485.

(b) 1 *Y. & C. (C. C.)* 672.

1845.

Nov. 18.  
Dec. 5.  
1846.  
Jan. 14.

HANDLEY v. METCALFE.

**T**HE testatrix directed her trustees, as soon as her grandchildren should respectively attain the age of twenty-one years, to transfer into each of their names the sum of 200*l.* sterling, to whom she gave and bequeathed the same accordingly, and if there should be any surplus monies remaining, to divide the same amongst her said grandchildren.

In order to save the expense of serving different parties, an inconsiderable aggregate fund was ordered to be severed and carried over to separate contingent accounts.

There was a deficiency of assets, and the only sum to provide for these legacies was 463*l.* 3 per cents.; and here were eleven infant grandchildren to participate in it.

One of the children, *Mary Ann Walker*, attained twenty-one, and a petition was presented by the children, praying payment of one-eleventh of the fund to *Mary Ann Walker*, and that one-eleventh might be transferred to the separate account of each of the remaining infant legatees, to an account to be intituled "the contingent legacy account."

*Mr. Freeling*, in support of the petition. The contingent share of each child amounts to about 45*l.*, and of service on the executor and the other parties be required every time a child attains twenty-one and applies for his share, the fund will be wholly exhausted in costs; but if the funds be carried over to separate contingent accounts, that result may be avoided.

*Mr. Renshaw*, for the surviving executor, supported the application.

*The*

1845.  
  
 HANDLEY  
 v.  
 METCALFE.

*The MASTER of the ROLLS.*

Where an aggregate fund is subject to contingencies, it is generally kept together, until the contingencies happen, and a party becomes absolutely entitled.

Here the only contingency is the attaining twenty-one. On attaining that age, each acquires an absolute interest. The point is whether the shares can be carried to separate accounts so headed as to prevent the fund being paid out, unless the legatee attains twenty-one.

It is a great object to save these parties the expense; and I will enquire whether it can be done: I am disposed to assist them.

1846.  
 Jan. 14.

*The MASTER of the ROLLS* ordered, that one-eleventh of the residue be paid to the adult grandchild, and that one-eleventh be carried over to an account, to be intituled, "The account of the Plaintiff *Amelia Handley*, contingent on her attaining the age of twenty-one years;" and he made a similar order as to the one-eleventh of the other infant grandchildren. The order proceeded thus: "and in case of the persons to whose accounts the said shares in the said residue of the said bank annuities, so to be carried over as aforesaid, should die under the age of twenty-one years, or attain that age, they, or any persons interested in the said bank annuities, respectively, are to be at liberty to apply to this court as they shall be advised." (a)

(a) *Reg. Lib.* 1845, A. fo. 407.

1846.

GHOST *v.* WALLER.

March 5, 6.

UPTON *v.* WALLER.

**M**ARY FIELD, being entitled to a moiety of some freehold property at *Bath*, had, in *May* 1837, agreed to sell it to the owner of the other moiety.

Where trustees for sale sell the trust property, and place the conveyance, executed by them and having their receipt endorsed, in the hands of a solicitor, who receives and misapplies the purchase-money, they are liable for a breach of trust.

In 1838, a marriage was agreed upon between *Mary Field* and *James Ghost*, and a settlement, dated in *August* 1838, was executed, by which the property was conveyed to *Waller* and *Young*, to the use of the Plaintiff and her heirs until the marriage. The trustees had a power of sale which was capable of being executed before or after the marriage, and they were to lay out the proceeds (after paying 70*l.* to *Mary Field*) in the consols, and stand possessed thereof on the trusts of an indenture of even date. These trusts were declared to be for *Mary Field*, her executors, &c., until marriage, and afterwards for the separate use of *Mary Field*, for life, without power of anticipation, and after her decease, upon certain trusts for the husband and children, and in default, for *Mary Field*.

A marriage being in contemplation, *A. B.*, the intended wife, conveyed property to trustees, for herself until marriage, and then for her separate use, for life, without power of anticipation, and subject to certain interests to her husband and children, if

Some delay took place in the solemnization of the marriage, and in the mean time the sale of the estate was completed. Both *Mary Field* and the trustees were made parties to and executed the conveyance, dated the

any, for herself. Before the marriage took effect, the trustees committed a breach of trust, against which *A. B.* by her solicitor, gave an indemnity. The marriage took effect two years after the settlement, and the husband died without children. Held, that the indemnity was valid and subsisting, and that the trustees had been released from their liability.



1846.  
 GHOST  
 v.  
 WALLER.

the 14th of *September* 1838, and the trustees also signed the receipt for the purchase-money indorsed thereon. The trustees handed back the conveyance to Mr. *Osbaldeston*, the solicitor of *Mary Field*, who completed the purchase, and received and retained the purchase-money, and the same was lost by his subsequent bankruptcy.

Proceedings were taken against *Osbaldeston* by and in the name of *Mary Field*, to recover the amount; but there being a difficulty in sustaining this action in her name, an application was made to the solicitor of the trustees, for permission to use their names in another action against *Osbaldeston*. They consented, on receiving an indemnity from the costs and a discharge from all liability in regard to the money, if any existed, and this *Mary Field* agreed to. Accordingly, Mr. *Woolley*, her solicitor, after conferring with her and obtaining her assent, wrote to the trustees a letter, dated the 21st of *January* 1840, which was as follows:—

“ Upon your sending me a copy of the trust deed, and the trustees assisting to make an arrangement of the present action of *Field* against *Osbaldeston*, and in failure of effecting an arrangement to the satisfaction of the trustees and Miss *Field*, to immediately give instructions to me to commence an action against Mr. *Osbaldeston*, in the name of trustees, for the purpose of receiving the money, on these conditions, she, *Mary Field*, hereby authorizes me to give up all claims, if any she has, against her trustees, for negligence or otherwise, in regard to the trusts created by the deed of trust bearing date the 6th and 7th of *August* 1838, and to indemnify the trustees against all costs and charges, at any time incurred by the said  
*Mary*

*Mary Field* in the name of the said trustees, relative to his claim on *Osbaldeston*."

1846.

GHOST

v.

WALLER.

The trustees (in the opinion of the Court) complied with their part of the agreement. Afterwards, in *May* 1840, the marriage took place between *Mary Field* and *Ghost*.

The money was lost by the bankruptcy of *Osbaldeston*, and this bill was filed in *April* 1842 to make the trustees responsible for the amount. *Ghost* died in *January* 1843, and there were no children of the marriage. His widow married again to *Upton*, and a supplemental bill was thereupon filed by her by her next friend.

*Mr. Kindersley* and *Mr. Hetherington* for the Plaintiff.

*Mr. Roupell* and *Mr. Henry Stevens* for the Defendants.

*Mr. Kindersley* in reply.

*The MASTER of the ROLLS.* Cases of this kind, where the Court has to determine which of two innocent parties is to sustain a loss, must be attended with great hardship.

In cases of breaches of trust, it is of great importance to the community, that trustees, who take on themselves the protection of the property of others, should be made to feel that they will be held liable for trust property which is lost, by their acts of omission or commission, and that such liability will be enforced against them. That being the liability of trustees, it is, on the other hand, of great importance, to take care, that trustees are not charged, unless they are dis-



## CASES IN CHANCERY.

1846.

GHOST

v.

WALLER.

tinctly proved to have been guilty of some act of omission or commission. If it were otherwise, no man would ever become a trustee, and all the benefit and protection which result from that office would be lost.

Here, the trustees, being asked to execute the conveyance and sign the receipt, did it accordingly, and placed the conveyance in the hands of *Osbaldeston*. By that means, they enabled him to receive the purchase-money. The execution of the conveyance and the signing of the receipt were the only grounds on which *Osbaldeston* could demand payment from the purchaser, and he, in fact, obtained possession of it by these means. I am of opinion, that the money which they enabled *Osbaldeston* to receive was subject to such trusts as might arise from the settlement, and that the trustees became liable; for they authorized the payment of the money to *Osbaldeston*, instead of taking possession of it and investing it on the trusts of the settlement. They afterwards received the indemnity of the 21st of *January* 1840, which, it is said, was destroyed by the subsequent conduct of their solicitor. I will read over that part of the case. If I should be of opinion that this indemnity is not gone, the loss will fall on the Plaintiff, otherwise the Defendants will be the sufferers.

March 6.

*The MASTER of the ROLLS.*

I have read these papers, and, on the first point, my opinion is not altered. I continue to think, that the trustees did make themselves liable for the sum of 850, by executing the deed and signing the receipt, which induced the parties to pay the purchase-money to *Osbaldeston*.

I am

I am of opinion, further, that the letter of the 21st of *January* 1840, by its force and effect, so far as the Plaintiff is concerned, released the trustees from the liability which they had incurred. It was not, and could not be, a general release, for, as the matter then stood, the settlement having been executed in contemplation of a marriage which had not then taken place, and though the only trust and duty before the marriage was for the Plaintiff herself, yet there were other persons who, in the event of a marriage, might have become interested in the property, and in the performance by the trustees of their duty. It could not therefore be, and was not, a release of the trustees, as respects the interests which might afterwards arise. I think the conditions of the release are distinctly stated in the letter, and these having been fulfilled, the trustees were no longer liable to the Plaintiff.

1846.  
GHOST  
v.  
WALLER.

The next question is, whether what subsequently happened placed them in a different situation; and, after giving my best attention to the subject, I am of opinion, that the trustees did not do any thing which had the effect of depriving them of the benefit of the indemnity. It is a grievous thing for the Plaintiff, but I think she is not entitled to the relief she asks against the Defendants.

Before I read the pleadings, it occurred to me, that although the Plaintiff might not be entitled to the relief she asks, yet that she ought not to be charged with costs; on a careful consideration, however, of this bill, I think that it does not contain any true statement of the facts, and, on more than one occasion, there is a misrepresentation of facts, which must have been known to her advisers. Considering this, and that the principal and only point is not prominently brought forward,

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ward,

1846.  
 GHOST  
 v.  
 WALLER.

ward, but mixed up with vague charges, I am of opinion that the bill must be dismissed with costs.

Mr. *Roupell* said, that the next friend was under sentence of transportation, and he asked the costs the trustees out of the other trust funds.

*The MASTER of the ROLLS.*

Let that circumstance be mentioned again, if any thing is to be founded on it. I do not think I can do any thing with it at present.

March 6.

BENSON v. LAMB.

Though time may not be of the essence of the contract, yet, upon unreasonable delay on the part of a vendor in completing, the purchaser, upon giving notice, may rescind the contract.

It being one of the terms of a contract between vendor and purchaser, that certain parties were to join in the conveyance, the Court would not enter into the question, whether they were necessary or proper parties.

THE Plaintiff, *Benson*, was mortgagee of some property of which he had a power of sale. When the mortgagor became bankrupt, and the Plaintiff thereupon made efforts to sell the property.

In July 1843, the Defendant, *Lamb*, who was tenant, entered into a negotiation to become the purchaser for 750*l*. An agreement was prepared, though not signed, by the parties; but a subsequent correspondence took place between them and their solicitors, which the Plaintiff insisted formed a valid binding contract. This was denied, and was the subject of controversy in this suit. It is unnecessary to set out this long correspondence. It is sufficient to state that the Court came to the conclusion, that, if there were a binding contract entered into by *Lamb*, one of the stipulations was, that the assignees of the mortgagor should concur in the conveyance, and that the purchase should be completed.

pleted on the 29th of *September*, and that, if the vendor should be unable to obtain the concurrence of the "requisite parties," each party to the contract should be at liberty to rescind it at ten days' notice.

1846.

BENSON  
v.  
LAMB.

It appeared, that the abstract had been sent and the conveyance prepared, and that, after some discussion as to the obligation of the vendor to obtain the concurrence of the assignees, the Defendant's solicitors, for the convenience of the other side, procured the execution of the conveyance by one of the assignees, and returned it on the 26th of *September* 1843.

The concurrence of the other assignees not having been obtained, the Defendant, *Lamb*, on the 24th of *November* 1843, gave notice to the Plaintiff to rescind the contract at the expiration of ten days, "in consequence of the requisite parties refusing to concur in the conveyance."

The intended purchase-money, which had remained idle pending the delay, was, in *January* 1844, invested in the purchase of another house, for the purpose of enabling *Lamb*, who was a schoolmaster, to follow his occupation.

Matters remained apparently dormant, but, in *March* 1844, the assignees executed the conveyance, and a request was made to the Defendant, *Lamb*, to complete, which he refused, and this bill was filed on the 1st of *June* 1844, for a specific performance of the agreement.

The bill was filed not only against *Lamb*, but against *Donne* and *Charles Russ*; and the way in which the latter were connected with the transaction was as follows:—On the marriage of *Lamb*, a sum of 500*l.*

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belonging

1846.

BENSON  
v.  
LAMB.

belonging to his wife was vested in *Donne* and *Charles Russ*, in trust, with the consent of the wife, to invest in government or real security or in the purchase of land; and it was intended, that this sum, together with an addition thereto, should be invested in the property in question, and the contract was entered into by *Lamb* with that view. It was insisted, by the Plaintiff, that the contract had been entered into on behalf of the trustees; but this was not made out; and the only thing relied on to fix them was, that *Charles Russ* acted as the clerk of *Lamb's* solicitor on the occasion; and that he had written part of the correspondence, and had settled the draft conveyance, and inserted therein the names of the trustees in lieu of that of *Lamb*.

The cause now came on for hearing.

*Mr. Teed* and *Mr. Batten*, for the Plaintiff, contended, that there was a valid, binding, and subsisting contract; that time was not of the essence of the contract; *Seton v. Slade (a)*, *Radcliffe v. Warrington (b)*; and that the purchaser had no right to rescind the contract, for the vendor had a full power of sale, which rendered the concurrence of the assignee unnecessary; besides which, the vendor, with as little delay as possible, had ultimately procured their concurrence; therefore, the Defendants were now bound to complete the contract.

*Mr. Kindersley* and *Mr. W. R. Ellis*, for *Lamb*, contended, first, that there was no binding contract; secondly, that if there were, it was an express term that the assignees, whether necessary parties or not, should con-

(a) 7 Ves. 265.

(b) 12 Ves. 326.

ur in the conveyance; thirdly, that, not having pro-  
 1 their concurrence within a reasonable time, the  
 ndant had a right to rescind the contract, if any;  
 or *v. Brown* (a), *King v. Wilson* (b); and, fourthly,  
 under the circumstances of this case, there would  
 , much hardship in compelling a specific perform-  
 , that the Court would not interfere.

1846.

BENSON  
 v.  
 LAMB.

r. *Turner* and Mr. *Rudall* for the trustees. There  
 , contract proved as between the Plaintiff and the  
 ees: the mere fact of one trustee acting as clerk of  
 b's solicitor is insufficient to bind him, and no au-  
 ty for him to act for *Donne*, the other trustee, is  
 n. If any contract existed, it was determined by  
 notice. Again, it would be a breach of trust for the  
 ees to invest the trust money without the consent  
 e wife, which she now refuses, and this Court will  
 ompel a party to commit a breach of trust.

r. *Teed* in reply.

he MASTER of the ROLLS.

do not know from the transactions which took  
 , whether, at the beginning of the negotiation, the  
 es, who seem to have had great confidence in each  
 ; did or did not intend to enter into a binding  
 contract. If that were their intention, it is to be  
 etted that they did not state the terms in writing,  
 sign an agreement, in such a way as to make it  
 ing under the Statute of Frauds. That is not the  
 se they pursued: they entered into a correspond-  
 ence,

2 *Beavan*, 180. *Watson v. Reid*, 1 *Russ. & Myl.*  
 6 *Beavan*, 124.; and see 236.; and *Guest v. Homfray*, 5 *Ves.*  
*v. Machu*, 5 *Hare*, 158.; 818.  
*by v. Hill*, 2 *Sim. & St.* 29.;



1846.

BENSON  
v.  
LAMB.

ence, which, whether it amounts to a binding contract or not, is far from free from doubt. I think the parties at one time thought it did. It is of some importance to see what is to be collected from all these letters as to the point principally in dispute; and I am of opinion, looking at the whole correspondence, that it was intended that the assignees should concur in the conveyance. One party thought it necessary for the purpose of obtaining a good title, or, what was equally important, to secure him from any future litigation; and the other side was of opinion that it was unnecessary, though they were not unwilling to procure the concurrence of the assignees; but it was, I think, ultimately the understanding on both sides, that the concurrence of the assignees should be obtained. Such being the agreement, I will not enter into the question whether they were proper or necessary parties: it is enough to say, that one of the terms of the contract, if there were any contract, was, that they should be parties.

The draft conveyance was prepared and sent by the Plaintiff's solicitors to the Defendant's solicitor, who, for the convenience of the Plaintiff's solicitors, procured the execution by one of the assignees, and returned the deed on the 26th of *September*. The Plaintiff and his solicitors professed to be, and were, desirous of procuring the concurrence of the other assignee, and then made a request to the official assignee, who created the difficulty; and, whatever endeavours were made to procure their concurrence, we find, that, from the 26th of *September*, when the engrossed deed was returned signed by one of the assignees, to the 29th, when the contract was to be completed, and even down to the 24th of *November* 1843, when the notice was given, or for two months, nothing was effectually done. I quite agree that the mere mentioning the 29th of *September*,

'ember, as the day for the completion of the contract, did not make time of the essence of the contract ; but where a contract is to be completed by an act to be done by the vendor, the time for performing it is not to be indefinite. Here the vendor was to have procured the concurrence of the assignees: for two months, he did nothing, and then the Defendant gave notice to do it in ten days, or to rescind.

1846.

BENSON  
v.  
LAMB.

The question is, whether he was right in thus proceeding, on the notion that, after the lapse of time, the assignees had refused to concur.

I think that the notice was lawfully given by the Defendant, and, the time having expired, the contract is at an end. In some of these cases it has happened, that after the time at which a party has given notice to put an end to the contract, some treaty or negotiation has taken place which has qualified the effect of the notice. I find no such thing in the present case.

Again, as regards the trustees; there was no contract with them, unless *Lamb* was their agent, which is not in any way proved. To say that the attorney's clerk was acting so as to bind his co-trustee, would be going too far.

I am of opinion that this agreement (if there were an agreement) cannot now be specifically performed. It may entitle the Plaintiff to damages, and nothing which passes here will affect that right.

The bill must be dismissed with costs, but without prejudice to any action the Plaintiff may be advised to bring.

1846.

*March 9. 11.*      **AMBROSE v. The Guardians of the Poor of the DUNMOW Union.**

A builder entered into a contract to build an union work-house on certain specified terms, but became bankrupt before it was completed, and it was finished by the guardians. A bill by the assignees to have an account taken of what had been done, was dismissed with costs, on the ground that it was not a proper subject for a suit in equity.

**T**HIS bill was filed by the assignees of *Ward*, builder, against the Guardians of the *Dunmow* Union, and Messrs. *Scott* and *Moffatt* their architects, under the following circumstances:

In *December* 1838, the guardians determined on building a workhouse, and they employed Messrs. *Scott* and *Moffatt* as architects, who prepared the plans and specifications.

*Ward* contracted to perform the works, according to the specifications, for 6500*l.*, upon the terms of a written contract, dated the 31st *December* 1838, by which it was stipulated, that the whole should be completed before the 1st *September* 1839. The works were to be under the superintendence of the architects, and any alterations, additions, or omissions, were to be valued by them. The guardians agreed to pay 75*l.* per cent. on the work actually done; and the remainder within three months after completion, and if *Ward*, from any cause whatever, should be prevented or delayed in the works, according to the agreement, or should not proceed to the entire satisfaction of the architects, they were empowered to give him three days' notice of their intention to employ other workmen. A penalty of 20*l.* a week was imposed, in case of non-completion before the 1st of *September* 1839, and the decision of the architects in respect to the amount, state, and condition of the works under the stipulations, and in respect of  
any

ny question as to their construction, &c., was declared  
to be final and conclusive.

1846.


AMBROSE

v.  
The DUNMOW  
Union.

On the 28th of *January* 1840, *Ward* entered into a  
second contract with the guardians, for the fixtures and  
things, to be completed before the 24th of *June* 1840,  
and at a price to be ascertained by two surveyors, one  
to be chosen by each party.

*Ward* proceeded with the works; but before they  
were finished, and on the 26th of *June* 1840, he became  
bankrupt. His creditors immediately agreed, that the  
assignees should complete the works, and gave notice to  
the guardians; but, on the 30th of *June* 1840, the ar-  
chitects gave notice to *Ward*, that in consequence of his  
not having proceeded in the works to their satisfaction,  
according to the contract with the guardians, they would,  
on the expiration of three days, employ other workmen  
to complete the same by measure and value, according  
to the terms and stipulations of the contract.

The architects employed other workmen, who ac-  
cordingly proceeded and completed the works, and they  
ascertained the balance due to *Ward* as follows:— The  
whole works, according to the specification, together with  
the extra work to be performed under the second con-  
tract, as valued by the architects, amounted to 7881*l.*,  
4*s.* 10*d.*; the works done by the guardians to complete,  
amounted, according to the valuation, to 1152*l.* 9*s.* 4*d.*,  
and this sum, together with 6500*l.* received by *Ward*  
on account, being deducted from the 7881*l.* 14*s.* 10*d.*,  
left a balance of 229*l.* 5*s.* 6*d.* due to the assignees,  
which the guardians offered to pay. The assignees dis-  
puted the accuracy of the amount; a correspondence  
took place, and ultimately this bill was filed, in *September*  
1841,

1846.  
  
 AMBROSE  
 v.  
 The DUNMOW  
 Union.

1841, against the above parties, praying, in substance that an account might be taken, and that the guardian might be decreed to pay the balance, and that ~~the~~ *and Moffatt* might pay the costs.

The Plaintiffs insisted, that the balance had been inaccurately ascertained, that delay had been occasioned by discussions of the guardians as to variations in the plans, by alterations and additions in the specifications, and by the delays and neglects of the architects and the clerk of the works in furnishing working plans &c. They insisted, that the notice given to *Ward*, after the bankruptcy, was invalid, and that all the subsequent proceedings of the guardians were improper, and, by their bill, they specified items of undercharge, as for a change in the situation of a well, and the use of bricks of a description different from those originally agreed on, in respect of which the Plaintiffs insisted the charges ought to be increased.

Mr. *Walpole* (in the absence of Mr. *Turner*), for the Plaintiffs, argued, that this was a case of a complicated account, and a proper subject to be enquired into here. He asked that an account might be taken of the works and *extra* works, and of those complete and incomplete at the date of the bankruptcy, and an account of the payments to *Ward*, and that the balance might be ascertained and paid, and that this might be accompanied with a declaration of the Court, that *Ward* was not bound to pay penalties for the non-completion of the works within the time specified, and that the clause making the decision of the architects conclusive was not binding on the Plaintiffs. He cited *Hiern v. Mill* (a), *Wilkinson*

(a) 13 *Ves.* 114.

*Wilkinson v. Beal* (a), and *Roche v. Morgell* (b), as to the effect of the prayer for general relief.

1846.

AMBROSE

v.

The DUNMOW  
Union.

Mr. *Kindersley* and Mr. *Goodeve*, for the Defendants, contended that the Plaintiffs' case was the proper subject for an action at law, and not for a suit in equity.


Mr. *Turner*, in reply, argued, that this was evidently a case in which it was competent for the Defendants to throw so many difficulties in the Plaintiffs' way in a court of law, that it would be hopeless for them to expect to obtain justice there. He also argued, that the contract, not being under the seal of the corporate body, could not be sued upon at law, and that this rendered it necessary to come to a court of equity for relief.

*The MASTER of the ROLLS.* The question in this case is simply this: — Whether this tradesman's bill is of such a nature, that it ought to be examined in a court of equity, or whether there is sufficient ground for having an account taken in a court of equity of the dealings between these parties.

The Plaintiffs in this cause are the assignees of the builder who was employed by the Defendants, the guardians of the *Dunmow* Union, to make certain buildings under one contract, and to furnish certain fittings under another contract. He was proceeding, at the same time, with the works comprised in the two contracts, and became a bankrupt before he had completed the works which were the subject of specification and of particular value. The guardians of the Union made out an account, in which they admitted themselves

(a) 4 *Mad.* 408.

(b) 2 *Sch. & Lef.* 721.


1846.  
  
 AMBROSE  
 v.  
 The DUNMOW  
 Union.

themselves to be indebted to the bankrupt in the sum of 229*l*. That sum was offered by them to the assignees of the bankrupt, who were not satisfied, and they filed a bill in equity to have the matter set right, to recover a larger sum.

That, I believe, is the whole substance of the case between the parties. When we look at the particulars, we find nothing which takes it out of that simple sort of case. There are often cases (*a*) in which this Court finds it very difficult to determine, whether the bill or account in dispute between the parties is a proper matter for an action at law or for bill in equity. The circumstances render it probable, that such might have been considered the case here, especially considering the mistake into which the parties had led their counsel, with respect to the particular mode in which the account had been rendered and made out. There were two contracts; one part of the first contract was for doing certain specified works for a certain specified sum; the other part was for extra and additional works for sums to be determined in a particular mode. The second contract was for fittings. The Defendants the guardians were to advance, from time to time, sums of money in proportion to the works done under the specification, to the extent of 75*l*. per cent. The guardians had advanced money upon certificates of the works done, which monies, at the time of the bankruptcy, amounted to 6500*l*. The whole works which he had done exceeded that sum, and amounted to 6729*l*. What they thought

(*a*) *Dunwiddie v. Bailey*, 6 *Santos*, 1 *Y. & J.* 574.; *Bowles v. Fox*, 136.; *Hirst v. Peirse*, 4 *Orr*, 1 *Y. & Col.* 464.; *Dartez v. Price*, 339.; *Ring v. Rossett*, 2 *v. Clemens*, 6 *Beav.* 165.; *Foley v. Jer.* 33.; *Frietas v. Dos v. Hill*, 1 *Phil.* 399.


thought fit to do, right or wrong, was this:—they said 6500*l.* is the sum to which the bankrupt was entitled under the first contract, for the specified work; we will give you credit for that sum, but then we must charge you with the expenses necessary to complete the specified work which you were bound to do. A valuation was made as to that, and it amounted to 1152*l.* 9*s.* 4*d.* They deducted this sum from the 6500*l.*, which left 5347*l.* 10*s.* 8*d.*, and they then added 1084*l.* 5*s.* 4*d.* for the [value of the additional work under the first contract, and 297*l.* 9*s.* 6*d.* for the valued work under the second contract. These three sums together amounted to 6729*l.* 5*s.* 6*d.*; and then taking credit for the 6500*l.* received by the bankrupt, it appeared clear enough in the result upon the figures, that 229*l.* 5*s.* 6*d.* was due to the assignees.†

1846.  
  
 AMBROSE  
 v.  
 The DUNMOW  
 Union.

Now, the real point in dispute is this:—Is that the value of the different works? Is the sum which you have put upon the *extra* work the right sum, or have the architects a right to fix the sum? Both those questions are raised. First of all, the Plaintiffs say, that Messrs. *Scott* and *Moffatt*, the architects, were not, under the terms of the contract, authorised to determine that; and then they say, that if they had a right to do it, they have done it in some erroneous manner which ought to be corrected. But are not all these questions which would be more properly raised upon an action to recover what was due? It is said, that the case is of such a nature, that a number of inequitable obstructions might be raised in an action; that it might be said, where is the authority for this alteration in the specification? How do you make this or that out? In short, that the Defendants might quarrel with every item, and make it necessary to come to this Court for an injunction to restrain the parties setting up such

VOL. IX. L l defences.



1846.  
  
 AMBROSE  
 v.  
 The DUNMOW  
 Union.

defences. Has any thing of the sort been yet suggested ? There is nothing to shew it; and is it not quite a new ground of jurisdiction to say, that all these matters must be determined in Chancery by an equitable process; for although the Plaintiffs have a legal demand, and might prosecute it, yet the Defendants might, possibly, set up difficulties, and that the Plaintiffs could not then go on without applying for an injunction to restrain the Defendants from raising those difficulties ?


I am of opinion, that this is not properly a case within the jurisdiction of a Court of Equity. The proceeding ought to have been in another Court, and, if necessary, the Plaintiffs might have filed a bill of discovery or a bill for an injunction, or might have sought any other kind of assistance to enable them to obtain justice in a Court of Law. As this case stands before me, I do not think there is any reason for directing any account in this Court.

Notwithstanding what is said in support of the bill, I think there are many improper and untrue charges in it, which have put the parties to a very great expense in giving evidence on them. If they were rightly inserted at first, they ought to have been expunged when the Plaintiffs found that they could not be maintained. Where a Plaintiff seeks a discovery of several matters necessary for the support of his case, he may be excused, and even justified, in inserting in his bill charges necessary to obtain the discovery required; but when, after having obtained further knowledge, he finds that those matters are not such as he had anticipated, he ought not, as it seems to me, to allow such charges to remain on the record; they ought to be expunged as soon as it is found they cannot be maintained. (a)

There

(a) See *Bate v. Bate*, 7 Beavan, 538.

There is another matter upon which I must make an observation: Why were these gentlemen, Messrs. *Scott* and *Moffatt*, made Defendants? Has the least excuse been given for it? Has any ground been stated upon which costs could be asked against them; and this is the only possible ground upon which they could be made parties. Nothing of the kind. It may even be true, that they were made parties for the purpose of preventing the other Defendants from having the benefit of their evidence; but whether that was the purpose or not, the effect must have been so; and, as regards the evidence, which, in some respects, is not so satisfactory, on behalf of the Defendants, as I think might be wished, I must have regard to this circumstance, that, by this conduct of the Plaintiffs, the Defendants have been deprived of evidence which would have been most important.

1846.  
  
 AMBROSE  
 v.  
 The DUNNOW  
 Union.

Under all the circumstances of the case, I must dismiss this bill with costs.

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NOTE. — See *Kirk v. The Bromley Union*, V. C. E. 10 Nov. 1846, but reversed by the L. C. 26th of January, 1848.

1846.

March 17.

April 18.

## ALDERMAN v. BANNISTER.

Re-delivery of documents deposited in the Master's office ordered, on petition, in an abated suit.

In an abated suit, the Master has not jurisdiction, under the 60th Order of 1828, to direct the re-delivery of papers deposited in his office.

THIS suit was instituted by *Alderman* and wife against *Bannister* and *Monteiro*, and, by the decree made in February 1830, an account was directed to be taken, and the parties were to produce before the Master all deeds, papers, &c. in their custody.

Under this decree and on the application of the Plaintiff, *Bannister*, in December 1830, lodged certain books and papers in the Master's office.

The accounts in the Master's office were not prosecuted, the last warrant having been taken out in 1832. *Monteiro* died in 1844, and his representatives had not been brought before the Court.

Under these circumstances, *Bannister* presented a petition praying the re-delivery of the papers deposited in the Master's office.

Mr. *Flather*, in support of the petition, argued, that the suit having remained dormant so many years, the Defendant was entitled to the re-delivery of the papers, without being put to the expense of reviving the suit.

Mr. *Rolt*, for the personal representatives of *Monteiro*.

The MASTER of the ROLLS ordered the petition to stand over for further evidence.

The

The case was again mentioned.

Mr. *Turner* and Mr. *Flather*, in support of the petition.

1846.  
ALDERMAN  
v.  
BANNISTER.  
April 18.

Mr. *Rolt* for the personal representatives of *Monteiro*; and

Mr. *Parker* for the Plaintiff, did not object, but submitted that the Master himself had authority to make the order directing the re-delivery, under the 60th General Order of 1828 (a), and that a special application to the Court was unnecessary.

*The MASTER of the ROLLS.*

I think that the Master had not jurisdiction; but, with the consent of the Plaintiff, on whose application the documents were deposited, I think I may now make the order.

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NOTE. — The following is an extract from the *Deaves MS.*, p. 7.  
“ There are three cases in which the Court will order, though the case is abated.

“ 1st. For writings out of Court.

“ 2nd. For payment of money out of Court. (b)

“ 3rd. For dissolving injunction unless cause, as where the suit abates by the death of the Plaintiff, who has an injunction against the Defendant, the usual order is, that the injunction shall be dissolved unless the representatives of the person dead shall revive the case in a month after notice.” (c)

(a) *Ordines Can.* 24.

(b) *Roundell v. Curren*, 6 *Vcs.* 250.; *Wright v. Mitchell*, 18 *Vcs.* 293.; and *Black v. Creighton*, 2 *Moll.* 552.

(c) See *Chowick v. Dimes*,

3 *Beavan*, 290., and the cases in the notes to that case, and the 63rd order of May 1845; *Ordines Can.* 307.

1846.  


April 27.

## SUCKERMORE v. DIMES.

Under a common decree against an executor to take the accounts, the executor was interrogated as to two specified sums, and he fully answered. A new set of interrogatories were exhibited with a view of throwing discredit on this answer. Held, that the Master was wrong in allowing them.

**T**HE testator in this case died on the 29th of *July* 1835. The Defendant, who had been his solicitor, was his sole executor.

By the decree, it was referred to the Master to take an account of all dealings and transactions between the testator and the Defendant in the lifetime of the testator not included in the two settled accounts of the 18th of *January* 1833, and the 23d of *February* 1835; and the Master was also directed, in the ordinary form, to take the usual accounts of the personal estate, debts, &c. of the testator. And for the better taking the said accounts, it was ordered, that the parties should be examined upon interrogatories as the Master should direct.

As to the matters anterior to the testator's death, the Defendant was examined on special interrogatories; and as to the matters subsequent to the death or the executorial matters, he was not only examined on the interrogatories in the form usually used in the Master's office, but on other special interrogatories, particularly as to two bills of exchange for 200*l.* and 204*l.* 10*s.* alleged to have been part of the testator's estate.

The Defendant fully answered these interrogatories; but the Plaintiff being dissatisfied with the information obtained, and alleging that there were prevarications and inconsistencies in the several answers, proposed to examine the Defendant on a third set of interrogatories of a very special description. The tenth interrogatory sought

sought to discover whether the Defendant, after the testator's death, drew a bill for 204*l.* 10*s.* on *Fenton*, and whether it was not accepted and paid, and whether it was not given for money owing to the testator's estate; and by another interrogatory the executor was asked whether *Fiske* was not indebted to the testator in 200*l.*, and gave a bill for it in *September* 1834, and it sought to shew wilful default in the executor in not enforcing it.

1846.  
SUCKERMORE  
v.  
DIMES.

The Master certified that he had settled and allowed these further interrogatories, and the Defendant took exceptions to his certificate.

Mr. *Kindersley* and Mr. *W. T. S. Daniel*, for the Defendant, contended that these interrogatories were not justified by the decree, and were improper in form. *Moore v. Langford* (a) was referred to.

Mr. *Hardy*, for the Plaintiff, argued, that the prevocations and inconsistencies in the several answers of the Defendant were such as to justify the new interrogatories. He said that *Fiske* was indebted in 200*l.* to the estate of the testator, and *Fenton* being indebted to *Fiske*, it was agreed that *Dimes*, as executor of *Suckermore*, should draw on *Fenton* for 204*l.* 10*s.*, which he did, and received the amount as part of the assets of the testator. The Defendant gave a release to *Fiske*, and there was reason to suppose that it included monies due to the Defendant as executor of *Suckermore*.

[*The MASTER of the ROLLS.* You say that the Defendant received the money from *Fenton* in the name of *Fiske*, but, by agreement, that it should belong to the estate

(a) 6 *Sim.* 323.

1846.  
SUCKERMORE  
v.  
DINES.

estate of *Suckermore*. You have already examined him, whether he received it on account of the estate of the testator, and he denies it. Having got the discovery, you are at liberty to disprove it if you can; but how can you be allowed to exhibit additional interrogatories merely to throw discredit on the discovery you have already obtained ?]

The Plaintiff ought to be permitted to sift a matter respecting which there appears to be so much suspicion.

*The MASTER of the ROLLS.*

I cannot concur with the Master. I think that if the Plaintiff has a right to do what he seeks in this case, there ought to be something in the decree to authorize it. I should be reluctant to lay down any rule that parties are not entitled to a full discovery of the truth. I am of opinion that when you have once got a full answer to the interrogatories you have exhibited in the Master's office, you cannot exhibit fresh interrogatories, not for the purpose of carrying out the decree, but to obtain an answer contradicting that already sworn.

I do not mean to say, that the Master may not allow any further interrogatories, but I think that these are not warranted.

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1846.

MEYER v. MONTRIOU.

July 14, 15.

**B**Y the settlement made on the marriage of Mr. and Mrs. *Meyer*, certain monies in the funds were vested in trustees, on trust for the husband, wife, and children. The money was sold out and misapplied, and this suit was instituted by the children to make the trustees liable for a breach of trust. (a)

In a suit by children against trustees, to make them liable for a breach of trust, it was alleged by the trustees, that their Co-defendant, the tenant for life, had concurred; the decree was made against the trustees, without prejudice to any right or remedy they might have against the tenant for life.

At the hearing, the trustees were held liable, and it was referred to the Master to take an account of the trust monies, and of the application thereof. (b) The Master having made his report, the cause came on upon exceptions to his report and for further directions. One of the questions raised upon the exceptions was this:—Whether the original trustees of the settlement had been made a Defendant to the suit, but it was not prosecuted against him: by his answer he made certain statements in regard to the matters in question. This party being called, it was insisted by *Montrion*, that the answer, being a statement on oath, was receivable in evidence before the Master.

The answer of a Co-defendant cannot be received in evidence on an inquiry before the Master.

The MASTER of the ROLLS said, that he was of opinion that such evidence was not receivable, and that he believed that the very point had already been decided. (c)

The

(a) See *Meyer v. Montrion*, 10 Beav. 343.

(c) *Hoare v. Campbell*, 2 Keen, 553.

(b) See 5 Beav. 146.



1846.  
MEYER  
v.  
MONTRIOU.

The other exceptions having been disposed of, the cause came on for further directions, when the extent of the liability of the trustees was declared.

Mr. *Kindersley* and Mr. *Randell*, for *Montriou*, then stated, that it appeared from the answer, that the fund had been sold out at the earnest entreaty of Mrs. *Meyer*, and they asked an inquiry under what circumstances the stock had been sold out, in order to charge Mrs. *Meyer's* interest with the loss. (a)

The MASTER of the ROLLS held, that there was not a sufficient foundation for the inquiry, but he said he would make the decree without prejudice to any right or remedy Mr. *Montriou* might have against the interest of the widow, and, on the following day, he refused the widow her costs.

Mr. *Beales* (in the absence of Mr. *Turner*), appeared for the Plaintiffs.

Mr. *Willcock* for Mrs. *Meyer*.

Mr. *Campbell* for other parties.

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(a) *Booth v. Booth*, 1 *Beavan*, Sim. 180.; *Trafford v. Boehm*, 125.; *Woodyatt v. Gresley*, 8 3 *Atk.* p. 444.

1846.  


## WILLIAMS v. SYMONDS.

July 29.

**T**HIS was the petition of the Defendant *Ann C. A. Williams* and *Robert T. Ward*, praying a stop order on the funds in Court, and on a box in Court, containing securities.

Stop order, directing that a tin box in Court, containing turnpike securities, should not be parted with without notice to the Petitioner.

Mr. *Walford*, in support of the petition, stated, that a similar order had been made by the Master of the Rolls on the 10th of *June* 1845, upon the petition of one *Yalden*.

*The MASTER of the ROLLS* made the order, whereby it was ordered, that 16,521*l.* consols, standing in the name of the Accountant-General, and also a certain tin box deposited by the Defendant *Ann Symonds* with the Accountant-General, and indorsed with the words "In Chancery, *Williams v. Symonds*, Turnpike Securities," and marked with the letters X. Y. Z., be not paid out, assigned, transferred, or parted with, without notice to the petitioner *Robert Thomas Ward*. (a)

(a) *Reg. Lib. B.* 1845. fol. 1499.

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1846.

Feb. 20.

SPARLING v. PARKER. (a)

Tenant for life held, upon the terms of the will, entitled to the actual income made of the testator's property invested in mortgages and shares, from the time of the death until the conversion.

THE testator, amongst other things, bequeathed as follows:—“I give, devise, and bequeath all my monies, securities for money, and also all my real property, situate in *Bolton-le-Sands*, &c. &c. and elsewhere soever, and, by this language, I mean to comprise all that I possess, or that in any way belongs to me, be it of what nature, kind, or description soever (excepting those personal effects and chattels hereinbefore and hereafter bequeathed), unto *William Sparling*, *Thomas Hudson Bateman*, and *Robert H. Welch*, upon trust that they shall invest all such monies as shall be uninvested at the time of my decease (after providing for the bequests hereinbefore and hereinafter contained), and also the amount of all mortgages, shares, &c., as can be immediately sold without disadvantage, and otherwise so soon as may be, in the purchase of lands, as they shall judge most advantageous and convenient to the estates I already possess. And I direct, that the said *William Sparling*, *Thomas Hudson Bateman*, and *Robert H. Welch*, shall receive the interest, rents, and profits, yearly or half-yearly, accruing from all and every part of my said real and personal estate until converted into real property, as they severally shall become due; and that, after deducting from the said interest, rents, and profits, such expenses as they shall have incurred, during the preceding year, in the execution and management of this trust, and after defraying those just and necessary expenses, which the security and well-doing of the property committed to their charge may require, they the said *William Sparling*, *Thomas Hudson Bateman*, and *Robert H. Welch*, do  
and

(a) *S. C. antè*, p. 450.

and shall pay over the residue, yearly and every year, during the term of her natural life, unto and to *Eliza Ellen Parker*, the wife of the Rev. *William Parker*," &c.

1846.  
  
 SPARLING  
 v.  
 PARKER.

The testator then declared that "this annuity or life interest" should be for her separate use, and proceeded thus:— "And upon the death of the said *Eliza Ellen Parker*, I give, devise, and bequeath all my said real and personal estate until converted into real property, unto *Charles Sparling* and to his first and other sons after him, in the usual mode of succession; failing whom, then I give, devise, and bequeath all my said real and personal estate, until converted into real property, to *John Sparling*, and to his first and other sons after him, in the like succession; failing whom, then I give, devise, and bequeath all my said real and personal estate, until converted into real property, to *William Sparling*, and to his second and other sons in the usual succession, and to their heirs absolutely for ever," and he appointed *Sparling*, *Bateman*, and *Welch* executors of his will.

The testator died in *January* 1838, possessed of several mortgages, shares in gas light, railway, dock, and canal companies, and other personal property, but no part of it was of a wearing out description. The will was not so attested as to pass real estate. Soon after the testator's death, application was made to the Ecclesiastical Court for probate, which in *June* 1838, was refused; but in *July* 1841, the decree of the Ecclesiastical Court was reversed by the judicial committee of the Privy Council, and probate was granted on the 2nd of *December* 1841, to the Plaintiffs. A suit was instituted shortly after for the administration of the testator's estate, and by the decree the usual accounts were directed to be taken, and the cause now came on for further directions.

A question

1846.  
 SPARLING  
 v.  
 PARKER.

A question arose, between the tenant for life of the property, and those entitled in remainder, whether the tenant for life was entitled to the actual income produced from the testator's personal estate until conversion.

Mr. *Turner* and Mr. *Geldart*, for the Plaintiffs the trustees.

Mr. *Purvis* and Mr. *Walpole*, for the tenant for life.

Mr. *Roupell* and Mr. *Whitmarsh*, jun. and Mr. *Tinney* and Mr. *R. Perry*, for parties entitled in remainder.

Mr. *Kindersley*, for the heir at law.

The following cases were cited: *Gibson v. Bott* (a), *Sitwell v. Bernard* (b), *Dimes v. Scott* (c), *La Terriere v. Bulmer* (d), *Douglas v. Congreve* (e), *Taylor v. Clark* (g), *Caldecott v. Caldecott* (h).

#### *The MASTER of the ROLLS.*

As to the question raised on the construction of the will, respecting the interest of the tenant for life, I do not think there is much difficulty. The question continually arises, whether the tenant for life is entitled to enjoy property in specie, either during life or during some particular limited period; but each case of this kind must depend upon its own peculiar circumstances. Here the question to be considered is, whether the tenant for life is entitled, under the circumstances of this case, to enjoy the property in specie until the conversion is actually made.

I do

(a) 7 *Ves.* 89.

(b) 6 *Ves.* 520.

(c) 4 *Russ.* 195.

(d) 2 *Simons*, 18.

(e) 1 *Keen*, 410.

(g) 1 *Hare*, 161.

(h) 1 *Y. & C. (C. C.)* 312.

I do not find any point made here that this is perishable or wearing out property. True it is, that it is not that species of property in which the Court would direct investments to be made, but it is nevertheless a permanent species of property. What then did the testator intend should be done with it until the time arrived when the conversion, as directed by him, was effected? I find nothing in the will pointing to an immediate sale and investment in stock. The property was to remain invested in stock till it could be afterwards invested in land. What the testator says, is this:— “Upon trust, that they shall invest all such monies as shall be uninvested at the time of my decease, &c., and all mortgages, shares, &c., as can be immediately sold without disadvantage and otherwise, as soon as may be, in the purchase of lands, as they shall judge most advantageous and convenient to the estates I already possess.”

1846.

SPARLING  
v.  
PARKER.

The real estates were not devised by this will, because it was not duly executed; but the testator intended to devise them, and has expressed that intention; and he has allowed a postponement of the sale of the mortgages, shares, &c. with reference to the advantage and convenience of the real estates which he intended to devise. He then directs, that the trustees “should receive the interest, rents, and profits yearly or half-yearly accruing from all and every part of his real and personal estate, until converted into real property,” and paid to *Mrs. Parker*. He does not direct an “immediate” sale; but he uses the word “immediately” in connection with the words “without disadvantage,” and the words “as soon as may be” in connection with the words “when they should judge most advantageous and convenient to the estates I already possess;” and, having regard to those causes of postponement, which he had specially referred to, he directs that the “interest, rents, and profits

1846.  
  
 SPARLING  
 v.  
 PARKER.

profits of his real and personal estates until converted into real property" shall be paid to Mrs. *Parker* for life, and, upon her death, he gives, devises, and bequeaths "all his said real and personal estate, until converted into real property," unto *Charles William Sparling*, and to his first and other sons after him in the usual mode of succession; failing whom, he "gives, devises, and bequeaths all his said real and personal estate, until converted into real property," to *John Sparling*, and so on; and there is another instance of a like limitation in the gift over "of the rents and profits of his real and personal estate until converted into real estate."

I cannot certainly collect from this will, that the testator intended that there should be an immediate conversion of his personal property into realty, come what might. It is very true, that a trustee having a discretion to exercise according to the best of his judgment, would not be allowed to exercise it in such a capricious manner as to be injurious to any party. There has been no suggestion of any want of discretion on the part of the trustees, although the argument proceeded in part upon that footing. It is clear, however, that no person had any authority to sell for four years after the death of the testator, therefore no fault is attributable to any one; and the testator has said, "Let there be a conversion, if my estate require it, but in the mean time and until the conversion takes place, I give the profits to the tenant for life." The conversion which he had in contemplation could not be effected, first, because his will was disputed, and next because, when the will was established, it did not affect the real estate; but that is no reason why we should now try to escape from the intention he has expressed.

I confess

I confess I do not, at present, see any way by which we can escape from the direction he gives; he expressly says, that he means to comprise "all that he possessed or that in any way belonged to him, of what nature, kind, or description soever;" and he directs the rents and profits of that property which he afterwards calls "his real and personal estate until converted into real property" to be paid to one for life &c. It is said, that the rule of the Court is so absolute, that I must consider it the duty of the executors, who were not existing, to have converted it into real property within a year; but, considering the words of this will, I think I have no occasion to resort to that doctrine, which has unfortunately given rise to so many conflicting decisions of different Judges.

1846.  
SPARLING  
v.  
PARKER.

It is very much to be regretted that there is now no rule that can be relied on upon that subject. I am not, at present, called on to decide it, because it appears to me, upon the construction of this will, and in the absence of any neglect on the part of any one, that, I am authorised to say, that the tenant for life shall have the income of the property as it stood at the testator's death, until it shall be converted, and I think there should be general directions for that purpose.

*Mr. Turner.* Your Lordship gives the tenant for life the income produced since the death.

*The MASTER of the ROLLS.* Yes.



1846.

March 12, 13.

COX v. KING.

Under a decree to take an account of the testator's debts, and to compute interest on such of his debts as carried interest, the Master has not jurisdiction to allow a compensation to a party, for unliquidated damages, on a breach of covenant; but, upon an application to the Court, proper directions will be given for the investigation of such a claim.

IN 1805, *Parsons* sold and conveyed an estate to *Young* for 5105*l.*, and *Parsons* covenanted with *Young*, that, notwithstanding any act, &c. of his, he was lawfully and rightfully seised in fee, and had good right to sell, and was lawfully and rightfully quiet enjoyment, and that, well and sufficiently saved and secured harmless, against all former gifts, &c., and against all titles, troubles, &c. made, &c. by him *Parsons*.

*Parsons* died in 1808, and it was then found, that he had forged the will under which he had held the property. Two actions of ejectment were brought against *Young* in 1809 and 1810, which succeeded, and *Young* was evicted. *Young* paid the costs of the other side of the two actions, amounting to 202*l.* and 208*l.*, and his own costs were stated to amount to 472*l.*

A creditor's suit was instituted for the administration of the estate of *Parsons*, and in January 1810, a decree was made, whereby it was ordered, that the Master should take an account of what was due to the Plaintiffs and the other creditors of *Parsons* for their debts, and also an account of his funeral expenses, and to compute interest on such of his debts as carried interest, after such rate as the same respectively carried.

*Young* carried in his state of facts and charge under this decree, claiming the sum of 5105*l.*, and the costs of the ejectments, but he made no claim for interest. The Master, in 1811, allowed the claim for 5105*l.*, and postponed his decision as to costs.

Great

Great delay took place in the prosecution of the suit, and in 1845, the representatives of *Young* carried in a claim for 5105*l*. and interest and costs. The Master made his report in 1845 as to the debts of the testator, and he found a debt of 5105*l*. due to the representatives of *Young* upon the covenants in the conveyance, but he rejected the claim for interest and costs.

1846.

Cox  
v.  
King.

The representatives of *Young* took exceptions to the report, on the ground that the Master ought to have found, that there was due to them the sum of 5105*l*. and interest at 4 per cent. from 1810, and the amount of the costs and interest, or at all events for a larger sum than 5105*l*.

Mr. G. L. Russell (in the absence of Mr. Turner) in support of the exceptions, argued, that the exceptants were specialty creditors under the covenants for title, and that the proper measure of their demand was the amount of the purchase-money and interest, and the costs of the ejectments.

He cited *Lomas v. Wright* (a), *Watson v. Parker* (b), *Executors of Fergus v. Gore* (c), *Gibson v. D'Este* (d), *Edwards v. M'Leay* (e), *Lovell v. Hicks* (g), *De Bernales v. Wood* (h), *King v. Jones* (i), *Farquhar v. Farley* (k), *Lord Anson v. Hodges* (l); and see *Wainman v. Bowker*. (m)

Mr.

(a) 2 *Myl. & K.* 769.(h) 3 *Campb.* 258.(b) 6 *Beavan*, 283.(i) 5 *Taunt.* 418., cited 2 *Sugd.*(c) 1 *Sch. & Lef.* 107.*Vend.* 78.(d) 2 *Yo. & C. (C. C.)* 542.(k) 7 *Taunt.* 592.(e) *Coop.* 308., 2 *Swanst.* 287.(l) 5 *Simons*, 227.(g) 2 *Y. & C. (Exch.)* 46.(m) 8 *Beav.* 363.

1846.

Cox

KING.

Mr. *Kindersley* and Mr. *Osborne*, for the Plaintiff in the second suit, contended that the exceptants were not entitled to interest or costs; *Rigby v. Macnamara* (a), *Bell v. Free*. (b) Secondly, that under the decree, the Master had no jurisdiction to assess damages, or to allow interest, except on debts carrying interest; *Seton on Decrees* (c); and, thirdly, that the exceptants were disentitled by reason of their laches; *Cholmondeley v. Clinton* (d), *Cattell v. Simons*. (e)

Mr. *Teed* and Mr. *Freeling*, for executors.

Mr. *Hawkins*, for other parties.

Mr. G. L. *Russell*, in reply.

*The MASTER of the ROLLS.*

There has been most improper delay in the prosecution of this suit, and hence arises the question now under discussion.

It seems that in 1805, the testator conveyed a real estate to a Mr. *Young*, who is now represented by the exceptants to the Master's report. The consideration money was 5105*l.*, and the testator covenanted that he had good right to convey, for quiet enjoyment, and he entered into the other usual vendor's covenants. After the death of the vendor, the estate was claimed by a gentleman who had a better right. It is not necessary to consider the means by which the testator's pretended title had been acquired, it is shocking to think of the extraordinary fraud and forgery which had been committed, but with this we have nothing to do on this occasion.

(a) 2 *Cox*, 415.

(b) 1 *Swan*. 9*C.*

(c) *P.* 54.

(d) 2 *Jac. & W.*

(e) 8 *Beavan*, 243

sion. An action of ejectment was brought and was tried in 1809, and a verdict was found for the Plaintiff. A second action of ejectment was tried in the following year, and a second verdict was, on that trial, found for the same Plaintiff. The purchaser, who had paid 5105*l.*, was evicted, and by reason of the eviction, he became entitled to the benefit of the covenants entered into by the vendor.

1846.

Cox  
v.  
KING.

After the verdict had been obtained in the first action, a decree was made in this Court for taking an account of the estate of the vendor, and that decree directed the ordinary account of the testator's debts, with a direction to the Master to compute interest on such of the debts as carried interest. Some time after that decree had been made, and before the second ejectment had been tried, *Young* carried in a claim under the decree for an indemnity under the covenants. I have first to consider, what was the nature of the decree. It was a decree directing the Master to take an account of debts, and to compute interest on those carrying interest. What was the nature of his claim? Was it for a debt or any particular ascertained or liquidated sum due on agreement, covenant, or obligation? No; it was a claim for damages under the covenants for title. *Young* had, therefore, to consider, how he could make this claim available, and I think there was a course open by which he might have obtained that investigation of the matter in 1810, which those now representing him desire. I think there can be no doubt, that either by a bill or some special proceeding for that purpose, either at law or in equity, he might have been enabled to establish his claim, and I can have no doubt, that if this Court had been applied to, he might, notwithstanding the decree, have obtained liberty to file his bill, or bring his action, or go in before the Master, and he

1846.

Cox  
v.  
KING.

would thus have been enabled to bring forward his claim in such a manner as to obtain what he was justly entitled to in respect of the covenant of indemnity, and ample justice for the grievous frauds which had been practised on him. But what he did was to carry in a state of facts and charge, in which he set out the deed and covenants, and stated the ejectments, and that the possession of the property was taken from him; and he charged, that the estate of the testator was indebted to him, under and by virtue of the covenants, in the said sum of 5105*l.*, the amount of the purchase-money. He claimed this sum as a debt, and he also claimed as a debt the amount of two further sums for costs, but which were left in blank; for neither of these sums had then been fully ascertained by taxation, although one of them had been ascertained when the matter came afterwards under the consideration of the Master.

It is stated, and perhaps correctly, that considering the form in which the charge was brought in, and the foundation which it had on the covenants, the parties had some difficulty in prevailing on the Master to allow even the principal sum of 5105*l.*, but it was allowed, and that allowance is not impeached. What *Young* did was, to consider the purchase-money, after the estate was taken away, as a debt due to him; and he claimed it as a debt without interest, and there was nothing in the form of the charge or state of facts to indicate that he had any thing in view but the principal sum, which he charged the estate of the testator to be indebted to him.

This charge having been brought in, a delay took place in the investigation of it; owing probably to the pendency of the second action of ejectment, in which judgment was given in *November* 1810. Ultimately,

mately, the Master allowed this sum. It appears in the margin of the state of facts, that the Master had made the above allowance, and from the letter to *Young's* solicitor from his town agent, that he had not allowed the costs, because they had not been taxed. It seems to be inexplicable, when the amount of one set of costs had then been fully ascertained by taxation, that they should be stated to be disallowed, because there had been no taxation. The writer of the letter went on to say, "I do not know whether it is worth while to tax the costs, and, perhaps it would be better to take counsel's opinion on the point." Now, from that time, *August* 1811, down to 1845, after the Master had issued his warrant on preparing his report, there was not one word about this claim. Did the solicitor take the advice of counsel or not? Was that advice adverse to the claim or not? or was it this: "Wait till the Master makes his report, and then except to it." All this is left entirely in the dark; but in 1845, after the Master had issued his warrant on preparing his report, and notice had been given to the creditors to attend on settling it, the persons who now represent *Young*, appear before the Master and state a new case; they request him to take into consideration the interest of this sum, and also the costs, and to come to the conclusion that the principal and interest and costs are the amount of damages sustained. Was this a matter which the Master had a right to take into consideration under the decree? I am at a loss to conceive how, under such a decree as this, that conclusion could be come to, or how he could allow the principal and interest as the amount of damages in a decree for taking an account of debts and interest on debts carrying interest?

1846.

Cox  
v.  
KING.

Again, is there nothing to be taken into consideration on the other side? Are you to come, after thirty-five

*M m 4*

years,

1846.

Cox  
v.  
King.

years, and claim not only the principal money, but also the interest, and say that is the amount of the damages which you have suffered from the fraud. Where is there a case or authority for such a proposition? None of the cases cited appear to do any thing of the kind. They were cases where the matter being brought before the consideration of the Court, the Master was ordered to ascertain the proper amount of damages. There is no case in which, under a decree directing the Master to take an account of debts, and to compute interest on such of the debts as carried interest, the Master has considered the principal and interest as the amount of damages under a covenant which he was not authorised to assess.

But the most serious objection is, that the claim for interest was brought in too late. It is said that the parties acquiesced, and thus the Master allowed evidence to be brought in after the warrant on preparing his report. But the order of the Court is peremptory (a), and the Master could not dispense with it, even by consent or by any less authority than that of the Court itself. If there has been acquiescence, I should be sorry to deprive the parties of the right to substantiate their claim, if they have been acting under any misapprehension, and, therefore, I have thought it right to look back to the nature of this claim, and to see by the charge and state of facts, what was its character. I agree that the Master has not decided that he would not allow the costs; what he did say was, I will not allow them, unless you prove them by taxation, and I cannot tell that I shall allow them then. Under these circumstances, if they did not produce to the Master the bill of costs taxed, there must have been great laches. Parties cannot, after thirty-five

(a) 67th Order of April 1828, Ord. Can. 26.

five years acquiescence, say, they will now begin a new case. The other creditors would be entirely thwarted by this new claim, and I do not think this course of proceeding ought to be allowed.

1846.

  
Cox  
v.  
King.

There must have been great negligence or difficulty in prosecuting this suit, perhaps both. For twenty years no proceedings were taken, the estates were to be sold, and it would appear from the proceedings, that there was great difficulty in effecting the sales. Many applications, from time to time, were made to the Court, some for a compromise, and in 1831, there were fresh advertisements for creditors. These parties might or might not have seen the advertisement, there is no evidence upon it, nor is it explained why they waited from 1831, when the cause acquired activity, to 1845; there was no part of this period in which they might not have perfected their claim. Under these circumstances, I do not think I can allow the exceptions to the Master's report, but I will look at the case, and mention it to-morrow.

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*The MASTER of the ROLLS.*

*March 13.*

I have read this case, and I see no reason to alter my opinion. The exceptions must be overruled with costs.



1846.



Jan. 21. 26.

March 20.

July 28.

## BAINBRIGGE v. BADDELEY.

A demurrer allowed to a bill, filed without leave, for relief, inconsistent with the relief obtained by the same Plaintiff in a former suit.

In 1846, the Plaintiff, claiming an estate under a will of 1815, filed his bill to impeach a subsequent will of 1818, which displaced his title, but had ever since been acted on. It appeared, on the face of the bill, that, on the testator's death,

the heir, who was the Plaintiff's father, disputed the will of 1818; but he afterwards, in 1820, confirmed it, and purchased a part of the property from the trustees claiming under it. The heir afterwards sold the benefit of the contract to the Plaintiff, who obtained possession before the completion of the contract; and the trustees having commenced an action of ejectment against him, the Plaintiff filed his bill against the trustees, and the parties claiming beneficially under the will of 1818, contesting the will, and praying that its validity might be ascertained, and, if valid, then that the contract might be specifically performed. At the hearing, in 1833, so much of the bill as questioned the validity of the will was dismissed with costs; and the bill was also dismissed as against all the parties except the trustees; and a specific performance was decreed. No objection being taken, the Master reported in favour of the title, and the report was confirmed. Held, that, the decree in the first suit, being inconsistent with the relief prayed by the present bill, it ought not to have been filed without the leave of the Court; and a general demurrer was allowed.

**T**HIS case came on upon a demurrer to the whole bill. The facts are sufficiently detailed in the judgment of the Court.

Mr. Kindersley, Mr. Daniel, and Mr. Prior, in support of the demurrer.

Mr. Spence, Mr. Turner, and Mr. E. Webster, for the bill.

Mr. Kindersley, in reply.

The following cases were cited:—*Brandlyn v. Ord* (a), *Mitford on Pleading*, 83. 86, 87., 206. (b), *Wortley v. Birkhead* (c), *Beames on Pleas*, 205., *Earl of Peterborough*

(a) 1 Atk. 571.

(b) 4th ed.

(c) 3 Atk. 809.

*rough v. Germaine (a), Hodson v. Ball (b), Young v. Leighly (c), Giffard v. Hort (d), Lord Bacon's Orders (e); and see Davis v. Bluck (g), Wilson v. Todd. (h)*

1846.  
BAINBRIGGE  
v.  
BADDELEY.  
July 28.

*The MASTER of the ROLLS.*

This case came on to be heard upon a demurrer to the re-amended bill.

*Thomas Bainbrigge*, by his will, dated the 15th day of August 1815, gave his mansion-house at *Woodcots* and divers lands to *Ann James*, *William Hall*, and *James Blair*, in fee, in trust (after paying certain annuities), out of the rents, to pay certain sums for the maintenance and education of an infant child, called *Mary Ann Bainbrigge*, until she attained twenty-one years of age or was married with such consent as therein mentioned, and on certain further trusts until the same time, and, after that time, in trust for her separate use during her life, and, after her decease, for the use of her first and other sons successively in tail male, with remainder for the use of her daughters, in equal shares as tenants in common, in tail, and, for default of such issue, upon trust for the use and benefit of the Plaintiff, described to be the testator's nephew, the eldest son of his brother *Joseph Bainbrigge*, and the heirs of his body lawfully issuing, with other remainders over. The testator made a first codicil, dated on the same day as the will, but not altering the devise before stated.

He is alleged to have made a second codicil to his will, dated the 17th day of June 1818, whereby, subject

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|---------------------------------------|------------------------|
| (a) 6 B. P. C. 1. (Tomlin's edit.)    | (d) 1 Sch. & Lef. 386. |
| (b) 11 Simons, 456., and 1 Phil. 177. | (e) 1 Sand. Ord. 109.  |
| (c) 16 Ves, 348.                      | (g) 6 Beav. 393.       |
|                                       | (h) 1 Myl. & Cr. 42.   |

1846.  
 BAINBRIGGE  
 v.  
 BADDELEY.

subject to the limitations in his will contained in favour of *Mary Ann Bainbrigge*, and in favour of her husband, children, and issue, and, in preference to limitations in his will and first codicil contained in favour of the children of his brother *Joseph*, he made certain other devises. It is further alleged, that, on the 18th of *June* 1818, he made a new will of that date, and thereby devised certain parts of his real estates and his personal estate to *James Blair*, *Robert Wood*, and *John Hawthorne*, their heirs, executors, administrators, and assigns, on certain trusts therein mentioned. And he devised to the same persons and their heirs various property, and his capital messuage, called *Woodcots*, and other lands, which had been, by his former will, devised as before mentioned, upon various trusts, during the minority of *Mary Ann Bainbrigge*; and after she should attain the age of twenty-one years, or be married with such consent as therein mentioned, upon trust for her during her life, and, after her death, for the use of her first and other sons successively in tail, with remainder to her daughters as tenants in common in tail, with remainder for the use and benefit of the children, sons and daughters of *Elizabeth Arnold*, in manner in the said will mentioned, with remainder to the testator's right heirs for ever.

The testator died on the 19th or 20th day of *June* 1818, and the will of the 18th of *June* 1818 was acted on and proved in the Ecclesiastical Court, and the trusts thereof were, to some extent, carried into execution under the directions of this Court.

At the death of the testator, *Mary Ann Bainbrigge* was still an infant. On the 17th of *July* 1825, she married *George Alsop*, who assumed the name of *Bainbrigge*, and there was issue of the marriage two children and no more, viz. *Thomas Alsop Bainbrigge* and *Ann Adelaide*

*Adelaide Bainbrigge.* They are all of them now dead. *Mary Ann Bainbrigge* died on the 27th of *January* 1838, *Thomas Alsop Bainbrigge*, her son, died on the 30th of *December* 1843, and *Ann Adelaide Bainbrigge*, the only surviving issue of *Mary Ann Bainbrigge*, died on the 14th of *July* 1845.

1846.  
BAINBRIGGE  
v.  
BADDELEY.

Upon this event, if the will of *August* 1815 was a valid will, *i. e.* if it was not revoked or altered by the alleged codicil of the 17th of *June* 1818, or the alleged new will of the 18th of *June* 1818, the Plaintiff became entitled in possession to the estates devised to him, on failure of the issue of *Mary Ann Bainbrigge*, and he has filed this bill for the purpose of having such issues or actions directed, as may be necessary to try the validity of the alleged will of the 18th of *June* 1818, and for consequential relief, if it should appear that the same will was not valid.

*Primâ facie*, the Plaintiff asks no more than he may well be entitled to. The will of *August* 1815, if not revoked, gives him, in the events which have happened, a title in possession to the estates in question. That title is impeached, only by the alleged subsequent will of *June* 1818, which, he says, is invalid, by reason of the testator's insanity at the time when it was made. The estate is so situated, that the question cannot be tried at law without the assistance of this Court, and he desires relief in this Court in a very usual form.

The demurrer is founded on other facts, which are stated in the bill.

The testator left *Joseph Bainbrigge*, the Plaintiff's father, his heir-at-law. He at first disputed the validity of the will of 1818, alleged that it had been obtained  
by

1846.  
  
 BAINBRIGGE  
 v.  
 BADDELEY.

by fraud ; but, in the year 1820, he entered into a compromise with the trustees, *Blair, Wood and Hawthorne* ; and, by a deed, dated the 6th day of *December* 1820, *Joseph Bainbrigg*e, as the heir of the testator *Thomas Bainbrigg*e, confirmed the will of *June* 1818, released to the trustees all the estates therein comprised, and acknowledged that he was fully satisfied and convinced, that *Thomas Bainbrigg*e, at the time when he made the will, was of sound mind, and that the will was duly executed. By certain articles of agreement, also dated the 6th of *December* 1820, and made between *Blair, Wood and Hawthorne*, as devisees, in trust, under the will of *June* 1818, of the one part ; and *Joseph Bainbrigg*e, the heir, of the other part ; the trustees, subject as therein mentioned, agreed to convey to *Joseph Bainbrigg*e and his heirs a messuage and piece of land in *Derby*, and a perpetual fee farm rent, at a price to be fixed by arbitration. *Joseph Bainbrigg*e either then was in possession, or afterwards entered into possession, of the house comprised in this contract ; and on the 6th day of *February* 1824, the Plaintiff entered into a contract in writing, with his father *Joseph Bainbrigg*e, who thereby, for valuable consideration, agreed to give up to the Plaintiff the possession of the *Dowghome* and premises then in his occupation, being the premises comprised in the contract of the 6th of *December* 1820, together with all the benefit of the contract entered into by him, with the executors of the late *Thomas Bainbrigg*e, for the purchase thereof.


This agreement, which was of no value, if the trustees under the will of *June* 1818 had no title, was not completed by conveyance and payment of purchase money, and, the Plaintiff being in possession, an action of ejectment was, in *Easter* term 1831, commenced against the Plaintiff and others, by *James Blair*, on the demise

demise of himself and his co-trustees, *Wood* and *Hawthorne*, for the recovery of the premises comprised in the contracts of the 6th of *December* 1820 and 6th of *February* 1824; and thereupon the Plaintiff in this cause, on the 9th of *June* 1831, filed his bill of complaint in this Court, against the trustees and against *Joseph Bainbrigge* and *Hannah* his wife, and also against *George Alsop Bainbrigge* and *Mary Ann* his wife, *Thomas Alsop Bainbrigge*, and other persons claiming to be interested under the will of *June* 1818; and by such bill it was prayed, that the trustees might be restrained by the injunction of this Court, from proceeding in the action of ejectment under the legal title, which they claimed to have, either under the alleged will of *June* 1818 or under the deed of the 6th of *December* 1820. And that proper directions might be given for ascertaining the validity of the alleged will of *June* 1818; and, in case the same should be found valid, then that the covenants of the 6th of *December* 1820 and of the 6th of *February* 1824 might be performed; and the Plaintiff (as he says, for the special purposes of that suit) alleged, that *Thomas Bainbrigge* was, when he signed the will of *June* 1818, of unsound mind, and incapable of making a will, and that it was procured from him by fraud, but, he added, that, if the validity of the will were established, he would be ready and willing to perform the agreement and complete his purchase.

1846.  
BAINBRIGGE  
v.  
BADDELEY.

This was not an ordinary bill for specific performance: but the Plaintiff plainly put the validity of the will of *June* 1818 in issue, and called upon the Court to put the question into a proper course of investigation, and then to adjudicate upon it. If the will should prove to be valid, then and in that case only, the Plaintiff professed himself to be ready to perform the contract.

The

1846.  
  
 BAINBRIGGE  
 v.  
 BADDELEY.

The Plaintiff has not, in this cause, explained, why the bill was framed in that form, and has not stated what were the allegations in the answers, or what evidence was taken; but he informs us, that on the hearing of the cause on the 2nd of *July* 1833, the Vice-Chancellor of *England* dismissed the bill as against all the parties to the suit, except *Blair, Wood* and *Hawthorne*, the trustees; and also dismissed so much of the bill as sought to question the validity of the will of the 18th of *June* 1818, as against the trustees, with costs; and declared and decreed that the agreement of the 6th of *December* 1820 should be specifically performed; and it was referred to the Master, to inquire whether the Defendants, the devisees in trust, could make a good title to the premises comprised in the agreement.

Upon the reference as to title, no objection was made to it; and, on the 7th of *June* 1838, the Master reported that a good title could be made; and the report was afterwards duly confirmed.

In this bill, the Plaintiff has made several allegations, for the purpose of shewing, by way of argument or reasoning, that the validity of the will of 1818 was not properly in question, or was not or could not properly be decided in that suit. But, without regarding the particular mode or occasion on which the Plaintiff was advised to bring forward his claim, it appears : —

1. That the Plaintiff, for the purpose of obtaining relief in this Court, did file his bill, distinctly alleging the invalidity of the will, praying for a determination on that subject, and offering to perform an agreement, if the will should prove to be valid.

2. That

2. That he made Defendants to the suit, not only the parties to the agreement, who had no title if the will were not valid, but also the persons interested to maintain the validity of the will.

1846.  
BAINBRIGGE  
v.  
BADDELEY.

3. That the cause was regularly brought on to a hearing, and then dismissed as against persons claiming a beneficial interest under the will, and dismissed with costs against the trustees, whose title depended altogether upon the validity of the will.

4. That, notwithstanding these dismissals, the Plaintiff, upon the reference which was made as to the title, had an opportunity of shewing, if he could and thought fit, that the Defendants, the trustees, had no title. He made no objection. The Master found that a good title could be made: this finding was wholly inconsistent with the invalidity of the will, under which they were trustees, and the report was duly confirmed.

I do not consider that the Plaintiff, as devisee in remainder, under the will of *August* 1815, was, in any way, bound by the acts of his father as heir-at-law. As purchaser from his father, he perhaps could not, after what had passed, allege, that *Thomas Bainbrigg* died intestate; but there seems to be no reason why, during the infancy of the only tenant in tail, who was before him, he might not have rested upon the validity of the will of 1815, by reason of the invalidity of the will of 1818, and, at all events, he was, as purchaser, entitled to insist upon a good title being made out by the vendors. The vendors had no title except under the will of 1818: they were found to have a good title, and the finding was confirmed; and it seems apparent, that this finding would be inconsistent with a decree in conformity with the prayer of this bill.

Vol. IX.

N n

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1846.  
  
**BAINBRIGGE**  
 v.  
**BADDELEY.**

I am far from thinking that the proceedings in the former suit are inconsistent with the Plaintiff's title to relief upon another bill; but I think, that after the former proceedings, his bill, for such relief as he now asks, ought not to be filed without the leave of the Court; and this demurrer must therefore be allowed.

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**The ATTORNEY-GENERAL v. The Corporation  
of LEICESTER.**

*April 27.*

Liability of the new municipal corporations and the rate-payers of their boroughs for the breaches of trust of the old corporations, and the costs of obtaining redress.

The new corporations succeed to the debts and duties of the old corporations, whose place they now occupy, as well as to their estates, property, and rights.

**T**HIS case, reported in a former volume (*a*), now came on upon the Master's report, who, on taking the accounts directed by the decree, found a sum of 5365*l.* due from the Corporation and Mr. *Burbidge*, in respect of the breach of trust complained of by the information.

Mr. *Twiss* and Mr. *Blunt* now asked for an order for payment of the amount, together with the costs of the information.

Mr. *Turner* and Mr. *Rolt*, for the corporation, endeavoured to protect the corporation from payment of costs on two grounds; first, that it was the former, and not the present corporation, and their mayors and agents who had been guilty of the breach of trust, and that it would be a hardship and injustice on the present rate-payers of the borough of *Leicester*, to be visited with the costs of the delinquencies of the former town corporation; and, secondly, that the corporation were

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(*a*) 7 *Beavan*, 176.

not so much to blame, having followed, in ignorance, the course of dealing practised by their predecessors from time to time. (a)

1846.  
The  
ATTORNEY-  
GENERAL  
v.  
The  
Corporation  
of LEICESTER.

*The MASTER of the ROLLS.*

I have seldom been more surprised, than in hearing that this corporation is not liable to pay costs in such a case as this. It is true, that the members of the corporation, as at present constituted, are not personally delinquent, and that there is no imputation on them; but in considering the rights of the charity, it must be remembered, that the present corporation is but a continuance of the old (b), and succeeds to the debts and duties of the old corporation, whose place it occupies, as well as to the estates, property, and rights. (c)

The corporation had charity funds in their hands, and instead of seeing that it was properly invested and properly applied, they allowed it to remain in the hands of their town clerk, for the benefit of the mayor and town clerk; the charity was excluded from the benefit of it, and it became necessary to file this information to recover it back. To say, that this charity is not to have the costs of this information, in a case where there has been a dishonest use of its money, would be to act contrary to every established principle on the subject.

The Defendants must pay the costs, and interest on the amount found due.

- (a) *The Attorney-General v. Attorney-General v. The Corporation of Newcastle*, 5 Beav. p. 314.  
(b) *The Attorney-General v. Kerr*, 2 Beavan, 420., and *The* (c) 5 & 6 W. 4. c. 76. s. 92.

1846.

May 8.  
July 6.

## BIDDULPH v. Lord CAMOYS.

On an application that the solicitor of a feme covert might be appointed, under the 32d Order of 1845, guardian to defend her husband, who was a lunatic, the Court required evidence that the husband and wife had no adverse interests.

The Court refused to appoint the Plaintiff's solicitor guardian of a lunatic Defendant.

In appointing such guardian, the Court will not interfere with his discretion.

**T**HE Defendant *Darell*, a lunatic, though not found by inquisition, had been served with *subpœna*. (a)

Mr. *J. A. Cooke* now applied, under the 32d Order of May 1845 (b), that the solicitor who acted for Mr. *Darell's* wife in this suit might be assigned guardian of Mr. *Darell*, to defend the suit. He said that the solicitor of the suitors' fund was not necessarily to be appointed guardian.

*The MASTER of the ROLLS.*

The solicitor of the suitors' fund is only appointed when no other more proper person can be found to undertake the defence. (c) I must be satisfied, by affidavit, that the interest of the husband is not adverse to that of the wife before I can appoint him guardian.

The case stood over, and on the 6th of July,

Mr. *J. A. Cooke* renewed his application.

*The MASTER of the ROLLS*, not feeling satisfied with the explanations given, refused the application.

Mr. *J. A. Cooke* then asked that the Plaintiff's solicitor might be appointed, or if not, then that the solicitor

(a) See 7 *Beavan*, 580.  
(b) *Ordines Can.* 296.

(c) *Moore v. Plate*, 7 *I* 583.

citor of the suitors' fund might be named guardian, with an intimation that the wife's solicitor, Mr. *Addis*, should act under him.

1846.  
BIDDULPH  
v.  
Lord  
CAMOYS.

*The MASTER of the ROLLS.* I cannot think that the Plaintiff's solicitor would be a proper person to be appointed guardian, to put in the Defendant's answer, and defend the suit for him.

I have no objection to appointing the solicitor of the suitors' fund; but I will in no way whatever interfere with the exercise of his discretion.

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HARGRAVE v. HARGRAVE.

Mar. 27, 28.

**T**HE testator devised real estates to his son *John* for life, with remainder to *John's* children, as tenants in common in tail.

A receiver of a moiety of an estate, claimed by the Plaintiff as tenant in common with the Defendant, who was in possession of the whole, granted, under the circumstances.

The Plaintiff, *John Robert Hargrave* (an infant), by this bill, insisted, that he and the defendant, *William J. Hargrave*, as the only two children of the testator's son *John*, were entitled to the estate. The bill stated the existence of outstanding terms which prevented the Plaintiff proceeding at law, and it prayed a partition of the estate, an account of a moiety of the rents (the Defendant having been in the possession of the whole), and for a receiver and an injunction to restrain the setting up of the outstanding terms.

The Defendant insisted that the Plaintiff was illegitimate, that he had been born at a period when the tes-

1846.  
  
 HARGRAVE  
 v.  
 HARGRAVE.

tator's son *John* had no intercourse with his wife and was resident abroad, while his wife was resident in *England*. The Defendant admitted he was in receipt of the whole rents.

An issue as to the Plaintiff's legitimacy had been directed, and which had been found in his favour, and pending an application for a new trial (*h*),

Mr. *Turner* and Mr. *Kyle* moved for an injunction to restrain the Defendant from receiving the rents of a moiety, and for a receiver of the rents and profits of a moiety of the estate, and that the tenants might attorn as to a moiety thereof, and pay a moiety of their rents to the receiver, and that the receiver, as to such moiety, might be at liberty to manage, as well as set and let the same, with the approbation of the Master.

They cited *Calvert v. Adams* (*a*), *Evelyn v. Evelyn* (*b*), *Lowndes v. Baddington* (*c*), *Taylor v. Jardine*. (*d*)

Mr. *R. Perry* argued, that a receiver of a moiety could not be appointed; for "how (as was observed by Lord *Northington*) could a receiver let, set, or distrain, or take any step without the consent of the other coparcener." *Willoughby v. Willoughby*. (*e*) He observed that in *Tyson v. Fairclough* (*g*) Sir *John Leach* said: "I may observe that, even in the case of an actual exclusion of one tenant in common by another, I doubt whether this Court would appoint a receiver. If it were

(*a*) 2 *Dickens*, 478.

(*b*) *Ib.* 800.

(*c*) 3 *Dan. Ch. Pr.* 417. (1 Ed.)

(*d*) 8 *March*, 1840. Reg. Lib. B. fo. 447.

(*e*) 2 *Dick.* 478. n.

(*g*) 2 *Sim. & St.* 142.

(*h*) See next case, p. 552.

were an exclusion which amounted to an ouster at law, the party complaining must assert at law his legal title. If it were not such an exclusion, this Court would compel the tenant in common in receipt of the rents to account to his companion; but would not, I think, act against his legal title to possession; and the reason is, because the party complaining may, at law, relieve himself by the writ of partition. It is upon this ground that this Court has constantly refused to restrain a tenant in common from cutting timber, or doing any other act not amounting to destruction."

1846.  
HARGRAVE  
v.  
HARGRAVE.

He argued, that the notice of motion did not merely appoint a person to receive the infant's share of the proceeds from the party in possession, but actually displaced the possession of the other tenant in common, which Lord *Eldon*, in *Lowndes v. Baddington (a)*, appeared to have carefully avoided.

Mr. *Turner* in reply.

The MASTER of the ROLLS said he would examine the cases and give his judgment on a future day.

The MASTER of the ROLLS said that the Plaintiff might take the order. March 28.

(a) 3 *Dan. Pr.* 417 n.

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NOTE. — *Street v. Anderton*, 4 *B. C. C.* 414.; *Milbank v. Revett*, 2 *Mer.* 405.; *Smith v. Lyster*, 4 *Beavan*, 227.

1846.

May 8. 23. 25.

26.

Nov. 4, 5.

## HARGRAVE v. HARGRAVE.

Observations as to the nature and extent of proof necessary to establish a case of adulterine bastardy, and as to what kind of evidence is admissible in such cases.

A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law, is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by

shewing that the husband was, 1st. Incompetent. 2. Entirely absent, so as to have no intercourse or communication of any kind with the mother. 3. Entirely absent at the period during which the child must, in the course of nature, have been begotten. 4. Only present under circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question and establishes the illegitimacy of the child of a married woman.

It is, however, very difficult to conclude against the legitimacy, in cases where there is no disability and where some society or communication is continued between husband and wife during the time in question, so as to have afforded opportunities for sexual intercourse; and in cases where such opportunities have occurred, and in which any one of two or more men may have been the father, whatever probability may exist, no evidence can be admitted to shew that any man, other than the husband, may have been, or probably was, the father of the wife's child. Through the investigation the presumption in favour of the legitimacy is to have its weight and influence, and the evidence against it ought to be strong, distinct, satisfactory and conclusive.

THIS was a motion for a new trial of an issue upon the question of the legitimacy of the Plaintiff.

Mr. Kindersley and Mr. R. Perry, for the Defendant, in support of the application.

Mr. Turner, Mr. Butt, and Mr. Kyle, for the Plaintiff, in opposition to the motion.

*Goodright d. Stevens v. Moss (a), Morris v. Davies (b), The Queen v. The Inhabitants of Mansfield (c), Cleve v. Gascoigne (d), Locke v. Colman (e), Tatham v. Wright (g), Viscount Lorton v. Earl of Kingston (h), McGregor v. Topham (i), Wilson v. Beddard (k), White v. Wilson (l), Stace v. Mabbot (m), Mudd v. Suckermore. (n)*

(a) *Cowp.* 591.

(b) *5 Cl. & Fin.* 163.

(c) *1 Q. B. Rep.* 444.

(d) *1 Ambl.* 323.

(e) *2 Myl. & Cr.* 42.

(g) *2 Russ. & Myl.* 1.

(h) *5 Cl. & Fin.* p. 340.

(i) *3 Hare.* 488.

(k) *12 Simons.* 28.

(l) *13 Ves.* 87.

(m) *2 Ves. sen.* 552.

(n) Unreported.

The

*The MASTER of the ROLLS* reserved his judgment.

1846.

HARGRAVE

v.

HARGRAVE.

November 5.

*The MASTER of the ROLLS.*

This case came on upon a motion for a new trial, upon a question of legitimacy.

The Plaintiff, *John Robert Hargrave*, was born on the 17th day of *November* 1836, and is the son of *Mary Hargrave*, formerly *Mary Snow*, who, at the time of the Plaintiff's birth, was the wife of *John Hargrave* now deceased.

The Defendant, *William Joscelyne Hargrave*, is admitted to be the legitimate son of the same *John Hargrave* and *Mary* his wife.

The Plaintiff, as the son of *John Hargrave* his mother's husband, claims to be entitled, as tenant in common with the Defendant, to certain real estate, which, by the will of *Thomas Hargrave*, deceased, was devised to *John Hargrave* for life, with remainder to his children, as tenants in common in tail.

*John Hargrave* was married to *Mary Snow*, the Plaintiff's mother, on the 4th day of *December* 1816. They ceased to live together in the month of *July* 1824; but some intercourse or communication took place between them, from that time until the death of the husband, which happened on the 26th day of *March* 1840.

It is alleged by the Plaintiff that there were four children of the marriage, viz. *Thomas Hargrave*, who died on the 13th of *July* 1835, the Defendant *William Joscelyne Hargrave*, *Emily Hargrave* who died on the 3d of *July* 1835, and the Plaintiff himself, born, as I have said, on the 17th of *November* 1836.

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1846.  
HARGRAVE  
v.  
HARGRAVE.

The Defendant contends, that the Plaintiff is illegitimate, and that he is himself the only legitimate child of the marriage.

When the cause came on to be heard, an issue was directed to try whether the Plaintiff was or was not the son of *John Hargrave*.

The trial took place before the late Lord Chief Justice of the Court of Common Pleas, on the 7th day of *February* last, and the jury found a verdict for the Plaintiff.

The Defendant asks for a new trial on several grounds:—

1. That there are two witnesses whose testimony is material, who were not and could not be examined at the trial, but might now be examined.
2. That some evidence was improperly rejected by the learned Judge.
3. That there was some error in his direction to the jury.
4. That the verdict was against the weight of evidence, or that the evidence was not sufficient to support it.

Cases of this kind are often very difficult of investigation; the evidence adduced upon them often leads to very doubtful results, and if it were not for the rules and presumptions of law, which are resorted to, it would frequently be impossible to arrive at any satisfactory conclusion.

A child

A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence, shewing that the husband was: 1. Incompetent; 2. Entirely absent, so as to have no intercourse or communication of any kind with the mother; 3. Entirely absent, at the period during which the child must, in the course of nature, have been begotten; or, 4. Only present, under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman.

1846.  
HARGRAVE  
v.  
HARGRAVE.

It is, however, very difficult to conclude against the legitimacy, in cases where there is no disability, and where some society or communication is continued between husband and wife during the time in question, so as to have afforded opportunities of sexual intercourse; and in cases where such opportunities have occurred, and in which any one of two or more men may have been the father, whatever probabilities may exist, no evidence can be admitted to shew, that any man other than the husband may have been, or probably was, the father of the wife's child. Throughout the investigation, the presumption in favour of the legitimacy is to have its weight and influence, and the evidence against it ought, as it has been justly said, to be strong, distinct, satisfactory, and conclusive.

In the course of the investigation, I apprehend that evidence of every kind, direct or presumptive, may be adduced, for the purpose of shewing the absence of sexual intercourse, which, in cases where there has been

1846.  
HARGRAVE  
v.  
HARGRAVE.

been some society, intercourse or access, has been called non-generating access. We have, therefore, to attend to the conduct and the feelings, as evidenced by the conduct of the parties towards each other and the offspring, and even to the declarations accompanying acts, which are properly evidence. Such circumstances are of no avail against proper evidence of generating access; but they may have weight, when the effect of that evidence is doubtful. If the weight is not such as to convince the minds of those who have to determine the matter, the effect may only tend to shake, without removing, the presumption of legitimacy, which in such a case must prevail.

In the present case, for some years before the birth of the Plaintiff, his mother's husband usually resided in *France*, though he was in the habit of coming to *England*, I think frequently. He had affairs here, and attended to them personally; and he seems to have had, at least, occasional communications with his wife. Whether he had such a communication, at such a time, that he might have been the father of the Plaintiff, is the question. The Plaintiff was born on the 17th of *November* 1836. The mother's husband was in *England* in the year 1836, on the 10th of *January*, the 3d of *March*, the 4th of *April*, and the 10th and 11th of *May*. Where he was on the intermediate days does not so distinctly appear; but there is, I think, sufficient proof that he was at least *infra quatuor maria* during a period when he might have become the father of the Plaintiff. Under the circumstances, however, this is not enough. Though in *England*, had he or can he reasonably be supposed to have had intercourse with her? On this subject there is some evidence.

In

In the year 1836, Mrs. *Hargrave* lodged at No. 1. *Baal Zephon Street*. The witness, *Elizabeth Halyer*, had lodgings in the same house, and had become acquainted with her. Opposite to the same house, in the same street, the witness, *Sarah Payne*, lived, and kept a green-grocer's shop. *Sarah Payne* says, whilst she lived there, a man came and asked her if she knew Mrs. *Hargrave*; she answered in the affirmative, and pointed out the house. She saw him enter the house, and afterwards sit at the window of Mrs. *Hargrave's* room. She never saw him again; but in a day or two afterwards, Mrs. *Hargrave* told her that the gentleman she had sent across was her husband. She says that the time of this occurrence was in 1835 or 1836, and she thought it must have been the latter end of the year.

1846.

HARGRAVE  
v.  
HARGRAVE.

Mrs. *Halyer* is more distinct, she saw a man come across from the green-grocer's shop; he knocked at the door (*i. e.* at the door of the house No. 1.), she answered it, and he asked for Mrs. *Hargrave*. Mrs. *Hargrave* came down and said to the man, "Holloa *Jack*, what in the name of fortune brought you here?" She seemed surprised to see him, but after a few words passed, they went up stairs together. The witness saw the man again when he came down; it might be an hour or an hour and a half. He came down with Mrs. *Hargrave* and said, "Well mother, I shall be here again in six weeks," and he went away, apparently on friendly terms with her, and after he was gone, Mrs. *Hargrave* informed her it was her husband; but the witness had never seen the man before. She states positively, that the occurrence took place in *February* 1836.

On

1846.  
  
 HARGRAVE  
 v.  
 HARGRAVE.

On the 3rd *March* following, *Hargrave* was at the *Ship Tavern*, and he told the waiter, *Urwood*, that when he came again, he should bring *Mrs. Hargrave*. He returned on the 3rd of *May*; he had then a lady with him, and they stayed together, living as man and wife, till the 10th or 11th. She left the night before him. The waiter took her to be *Mrs. Hargrave*. *Mr. Rusby*, who had kept the *Ship Tavern* for thirty-eight years, knew *Hargrave*, who, though coming from abroad, frequented his house, and was there three or four times a year, sometimes more. He saw *Mrs. Hargrave* many times, and saw her with *Mr. Hargrave*, at the hotel, several times between 1834 and 1838. *John Hargrave* always slept at the hotel; when *Mrs. Hargrave* came in, she would go to the sitting-room up stairs. He once shewed her into the room; once or twice he saw her go up stairs. He saw her walk in and out on other occasions, and never saw her turned away from the door, but does not know who was with *Hargrave* in *May*. Has no doubt he saw *Mrs. Hargrave* several times in several years.

Upon this evidence, it appears not to be proved, that *Hargrave* was the visitor received by *Mrs. Hargrave* in *February* 1836. She told the two witnesses, *Payne* and *Halyer*, that he was, but neither of them knew him, so as to give any evidence of identity. And again, it is not proved (if the time and other circumstances made it important to prove it), that *Mrs. Hargrave* was the woman with whom *Hargrave* was at the hotel in *May* 1836. The waiter and the housekeeper took her to be so; but *Rusby*, who knew *Mrs. Hargrave*, does not know who was with *Hargrave* in *May*, and he does not appear to have been asked, whether he ever saw the woman who was then with him.

There

There was no concealment as to the pregnancy of Mrs. *Hargrave*, or the birth of her child, and about six or seven months after the child was born, his mother caused him to be baptized by the name of "*John Robert*, son of *John* and *Mary Hargrave*."

1846.  
  
 HARGRAVE  
 v.  
 HARGRAVE.

I have found nothing in the circumstances under which the separation took place, or in the character or conduct of *Hargrave*, or in the nature of the communications which took place between him and his wife, which render such an intercourse as the Plaintiff alleges to have taken place, in any considerable degree improbable; and if I were bound to decide the case upon the evidence as it stands, I should determine in favour of the legal inference of legitimacy, which I do not think would be affected by the alleged adultery of the wife, even if it were proved. (a)

Nevertheless, as there rests upon the case a degree of obscurity, which perhaps may, and if it can, ought to be removed; and as it appears probable, that there may be additional evidence on both sides, I am disposed to allow this case to be tried again, and the rather, because the late Lord Chief Justice *Tindal*, before whom the trial was had, had for a time at least, some doubt, whether the verdict was justified by the evidence; a doubt which I am bound, in favour of the Plaintiff, to say, might have been removed, if the time for further consideration, which he desired, had been allowed to him; but we unfortunately lost that eminent judge before he had an opportunity of giving the case the further attention, which, after communication with me, he had consented to bestow upon it.

Let the parties proceed to a new trial of the same issue.

(a) *Bury v. Philpott*, 2 *Myl. & K.* 349.

1846.

June 29.

## NORMAN v. STIBY.

Upon general demurrer, the Court considering there was a fair point for decision at the hearing of the cause, overruled the demurrer, leaving the point open at the hearing.

In 1805, *A. B.* purchased an estate with the money of *C. D.*, and executed a mortgage to secure the amount. *A. B.* was evicted, and he died in 1812. *C. D.* died in 1816. The same individuals represented both *A. B.* and *C. D.*, and in 1845 they established, under the covenant for title, a claim against the vendor's estate, for the amount of the purchase money. The

**T**HIS cause came on upon demurrer to the bill, which stated to the following effect: —

In 1805, *Parsons*, in consideration of 5105*l.*, sold and conveyed to *Young*, an estate, and he entered into covenants for title. To enable *Young* to complete the purchase, *Mrs. Davidge* advanced him 5000*l.* which was secured by mortgage by demise of the estate and by the covenant of *Young* to pay.

*Parsons* turned out to be tenant for life only, and after his death, and in 1809, *Young* was evicted.

*Young* died in 1812, and *Abbott* was his executor. *Mrs. Davidge* died in 1816; *Abbott* and *John Davidge* were her executors, and the two Plaintiffs and three other persons were residuary legatees. *John Davidge* died in 1835, and *Abbott* then became sole executor both of *Young* and *Mrs. Davidge*.

In April 1833, *Abbott* and *John Davidge* accounted to the Plaintiffs and the other residuary legatees for the residuary estate of *Mrs. Davidge* and obtained a release, but they did not disclose the existence of the mortgage debt of 5000*l.* *Abbott* died in 1844, and the Defendants *Stiby*, *Granger*, and *Warman*, were his executors.

We

residuary legatees of *C. D.* filed a bill in 1846 against the representatives to recover the amount; the Court thought, that there was so much probability, at least, of their ultimately establishing their equity, that it overruled a demurrer to the bill, leaving the question open at the hearing.

We must now return to the debt of 5000*l.* and to the circumstances which subsequently took place relative thereto, which were substantially as follows :— After the death of *Parsons* in 1808, a suit of *Cox v. King* (*a*) was instituted in this Court for the administration of his estate, and in which a decree was made in 1810 for taking the accounts. Under this decree, *Young* went in and claimed, by virtue of the covenants for title contained in his conveyance, the sum of 5105*l.* and the costs of two actions of ejectment. Great delay took place in the prosecution of the suit of *Cox v. King* ; but the executors of *Abbott* having during the last year prosecuted the claim of *Young* against the assets of *Parsons* in the Master's Office, it had recently been allowed to the extent of 5105*l.* only.

1846.  
NORMAN  
v.  
STIBY.

By this bill, filed in *June* 1846 by two of the residuary legatees of *Mrs. Davidge*, the Plaintiffs prayed, that the money recovered in *Cox v. King* might be applied in payment of the 5000*l.* lent by *Mrs. Davidge* to purchase the estate, and a declaration that the mortgage debt formed a lien thereon, and for payment of the deficiency out of the estate of *Young*, or for payment of the whole out of the estate of *Young*.

The bill alleged, that *Young* had paid interest until his death (1812), that the conveyance and mortgage had come into the possession of *Abbott* as representative of *Davidge*, and had been made use of by his executors in establishing the claim in *Cox v. King*.

To this bill, the executors of *Abbott* (who, it must be observed, were also the representatives both of *Young* and

(*a*) See *antè*, p. 530.



1846.

NORMAN

v.

STIBY.

and Mrs. *Davidge*) filed a general demurrer for want of equity.

Mr. *Roupell* and Mr. *G. L. Russell*, in support of the demurrer. The Plaintiffs' claim is barred by the Statute of Limitations. Where it appears on the face of the bill, that the cause of suit accrued more than six years before the filing of the bill, a Defendant need not plead the statute, but may demur; *Hoare v. Peck*. (a) The statute commenced running in 1812, on the death of *Young*, since which time there has not been any acknowledgment or payment of interest. When the time once begins to run, it continues, notwithstanding any subsequent disability; *Doe dem. Duroure v. Jones* (b), *Battley v. Faulkner* (c), *Rhodes v. Smethurst* (d), *Freake v. Crane-feldt* (e); and even the union of characters in *Abbott* will not avail to prevent the continued operation of the statute. Treating the Plaintiffs as suing for a legacy, or a portion of the residue, the Statute of Limitations, 3 & 4 W. 4. c. 27. s. 40., is applicable, and not only is it a bar to the remedy, but the right is extinguished; *Piggott v. Jefferson*. (g) The great length of time and laches are of themselves a bar; *Portlock v. Gardner*. (h)

Mr *Kindersley* and Mr. *Glasse*, in support of the bill. The Statute of Limitations has no application to this case, for *Abbott*, being the representative both of Mr. *Young* and Mrs. *Davidge*, must be assumed to have performed his duties to both, and the union of the two characters of debtor and creditor prevents the operation of

(a) 6 *Simons*, 51.(b) 4 *Term R.* 300.(c) 3 *Barn. & Ald.* 288.(d) 4 *Mec. & W.* 42.(e) 3 *Myl. & Cr.* 499.(g) 12 *Simons*, 26., and see*Sheppard v. Duke*, 9 *Sim.* 567.;*Prior v. Horniblow*, 2 *Y. & Coll.*(Exch.) 200.; *Phillipo v. Mun-**nings*, 2 *Myl. & Cr.* 309.(h) 1 *Hare*, 594.

of the Statute of Limitations; *Burrell v. The Earl of Egremont*. (a)

1846.

NORMAN  
v.  
STIBY.

Mr. Roupell in reply.

*The MASTER of the ROLLS.*

Some considerable difficulty may ultimately arise, from the peculiar circumstances of this case, and the length of time which has elapsed; but I think there is not much difficulty in saying what ought to be done on the present occasion.

A person of the name of *Parsons* alleged that he had a right to sell an estate. *Young* was disposed to purchase it, and, to enable him to do so, prevailed on *Davidge* to lend him no less than 5000*l.* out of the whole purchase money of 5125*l.*

The purchase money being paid, the estate was conveyed to *Young*, and on the following day a deed was executed for the purpose of securing to *Davidge* the money she had lent. By this deed the sum of 5000*l.* was secured to her by mortgage, and the covenant of the mortgagor.

If things had remained thus, there would have been nothing extraordinary, but soon after it appeared, that the vendor had no title beyond a life estate, and that he had committed a gross fraud, by mutilating the will under which he claimed. After his death it was detected, and the persons rightfully entitled under the will recovered possession of the estate, by means of actions of ejectment. In consequence of this, *Young*, who had purchased

(a) 7 *Beavan*, 205.

1846.  
  
 HARGRAVE  
 v.  
 HARGRAVE.

been some society, intercourse or access, has been called non-generating access. We have, therefore, to attend to the conduct and the feelings, as evidenced by the conduct of the parties towards each other and the offspring, and even to the declarations accompanying acts, which are properly evidence. Such circumstances are of no avail against proper evidence of generating access; but they may have weight, when the effect of that evidence is doubtful. If the weight is not such as to convince the minds of those who have to determine the matter, the effect may only tend to shake, without removing, the presumption of legitimacy, which in such a case must prevail.

In the present case, for some years before the birth of the Plaintiff, his mother's husband usually resided in *France*, though he was in the habit of coming to *England*, I think frequently. He had affairs here, and attended to them personally; and he seems to have had, at least, occasional communications with his wife. Whether he had such a communication, at such a time, that he might have been the father of the Plaintiff, is the question. The Plaintiff was born on the 17th of *November* 1836. The mother's husband was in *England* in the year 1836, on the 10th of *January*, the 3d of *March*, the 4th of *April*, and the 10th and 11th of *May*. Where he was on the intermediate days does not so distinctly appear; but there is, I think, sufficient proof that he was at least *infra quatuor maria* during a period when he might have become the father of the Plaintiff. Under the circumstances, however, this is not enough. Though in *England*, had he or can he reasonably be supposed to have had intercourse with her? On this subject there is some evidence.

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Mrs. *Davidge's* money paid for the estate; nevertheless, we will apply the damages recovered for the loss of the property, wholly for the use of his estate, without making her estate any compensation for the loss it has sustained." If it be the law that this injustice is to take place, the law must have its course; but let us at least be satisfied that the law is so. I have been told that it is of public benefit to give the Statute of Limitations its full operation. I agree that the statute discountenances all attempts to rake up old transactions; but I cannot think it will be a matter for triumph, if, in such a case as this, where all parties have been equally negligent, the law should inflict such a hardship on those claiming under Mrs. *Davidge*. If the law be so, the court must apply the rule, though it must regret to find it leads to such hardship and injustice.

1846.  
  
 NORMAN  
 v.  
 STIBY.

The Plaintiffs say: "your claim on the estate of *Parsons* being founded on the loss of our money, and the proof of your claim being established only by the production of our deeds, we have a right to have the money recovered from *Parsons* placed in the situation of the estate which has been lost, and applied accordingly." Again they say, "your right to recover was connected with a duty which you owed to us, and you cannot receive the compensation except with that duty attached to it."

I do not say that this will turn out so; but this is a proper point to be determined at the hearing of the cause; and it is not necessary for me now to decide it.

What I think is this, that there is so much probability, at least, of the Plaintiffs ultimately establishing

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1846.  
  
 HARGRAVE  
 v.  
 HARGRAVE.

been some society, intercourse or access, has been called non-generating access. We have, therefore, to attend to the conduct and the feelings, as evidenced by the conduct of the parties towards each other and the offspring, and even to the declarations accompanying acts, which are properly evidence. Such circumstances are of no avail against proper evidence of generating access; but they may have weight, when the effect of that evidence is doubtful. If the weight is not such as to convince the minds of those who have to determine the matter, the effect may only tend to shake, without removing, the presumption of legitimacy, which in such a case must prevail.

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In

The Plaintiff afterwards filed his bill in this Court, alleging that the bond was not according to the agreement, and that the reservation of the interest from the 1st of *January* had been inserted by accident and mistake, under circumstances explained in the bill and proved in the cause. The bill prayed, that the Plaintiff might be declared an equitable mortgagee of the leasehold, — and, if necessary, that the bond might be rectified, and for an account of what was due,—and, in default of payment, that the Defendant might execute to the Plaintiff an assignment of the premises and be foreclosed, or for a sale and payment.

1846.  
HODGKINSON  
v.  
WYATT.

On the first hearing of the cause, on the 26th of *May* 1845, the Defendant consenting (without prejudice, as after mentioned) to pay what might be due on the bond, an account was directed to be taken; but the decree was to be “without prejudice to any question as to the validity of the security, and the rights and equities of the Plaintiff, and to all questions in the cause, as well on the part of the Plaintiff as of the Defendant, with reference to, and so far only as such several matters might relate to, or affect, the costs of suit;” and the costs were reserved.

The Master found 530*l.* due for principal, and 133*l.* for interest, and the Defendant took exceptions to his report, which were overruled. The cause then came on for further directions.

Mr. *Kindersley*, Mr. *Turner*, and Mr. *S. P. White*, for the Plaintiff, contended, that there was a clear error in the preparation of the bond, and that no usury was intended: that the Court had authority to rectify the bond, and, in default of payment, to decree a foreclosure,

1846.  
  
 HODGKINSON  
 v.  
 WYATT.

with the costs of suit. They cited, in addition, *Glasfurd v. Laing* (a), *Buckley v. Guilbank* (b), *Nevison v. Whitley* (c), *Ballard v. Oddey* (d), *Beaumont v. Bramley* (e), *Ball v. Storie* (g), *Exparte Banglay* (h), *Scott v. Nesbit*. (i)

Mr. Roupell and Mr. Collins, for the Defendant, insisted that the bond was usurious and void, *Marsh v. Martindale* (k), *Barnard v. Young* (l), *Roberts v. Trayne* (m), and that the point having been already determined at law, by a court of competent jurisdiction, the Plaintiff had no right afterwards to come for relief to this Court, for there is no relief in Equity upon the omission of a defence at law; *Ware v. Horwood* (n). The Defendant did not object to pay the amount found due, but he insisted on these objections, as relieving him from the payment of the costs of suit.

Mr. Kindersley, in reply.

The MASTER of the ROLLS, in substance, said:— This case comes on under very peculiar circumstances. The Plaintiff brought his action on a bond for securing money stated to have been advanced on the 7th of January, and reserving interest from the 1st; and this being accompanied by a security on land was held to be usurious.

The

(a) 1 *Campbell*, 149.

(b) *Cro. Jac.* 677.

(c) *Cro. Car.* 501.

(d) 2 *Mod.* 307.

(e) *Turn. & Russ.* 41.

(g) 1 *Sim. & St.* 210.

(h) 1 *Rose*, 168.

(i) 2 *Cox*, 183., and 2 *B. C.* 641.

(k) 3 *Bos. & P.* 154.

(l) 17 *Vesey*, 44.

(m) *Cro. Jac.* 507.

(n) 14 *Vesey*, 31.

The Plaintiff afterwards files this bill, and says, "the contract for the security and real intention were free from usury," being different from what is expressed on the bond, and he prays that it may be rectified. If this had been asked before the trial of the action, there could be no doubt, that the Court, on being satisfied of the existence of the error, would have corrected the instrument, and made it consonant with the intention and agreement. The question is, whether it is now too late, and whether the equitable jurisdiction is to be excluded? I see no reason why it should.

1846.  
HODGKINSON  
v  
WYATT.

The Plaintiff also says, I lent my money on a double security, viz., on the bond and on the deposit of title-deeds, and I now claim to have the benefit of my equitable security. The Defendant insists that this Court cannot separate the two, and the bond having been found usurious, the whole contract is usurious. The Plaintiff's answer is this:—there has been a mistake in the preparation of the bond, and I now ask that it may be corrected.

I think it is clear, from the evidence, that a mistake has been made in the preparation of the bond, and that the real contract between the parties was free from usury, and the Plaintiff is now entitled to have it set right.

In order to determine the question of costs, it is necessary to determine who was in the wrong and caused the litigation. I am of opinion that the Defendant was in fault, and he must therefore pay the costs of the suit.



1846.

July 15, 16. 29.

PAGE v. HORNE.

Whether, after the execution of a marriage-settlement, which is not executory, the husband and wife have power before the solemnization of the marriage to revoke it, *quære*.

On the 14th of March, in contemplation of a marriage, a mortgage in fee was conveyed to trustees, on certain trusts for the intended wife, husband, and the issue of the intended marriage. On the 27th of March, the husband and wife revoked it. Upon a bill by the husband, claiming the mortgage *jure mariti*, the Court referred it to the Master to enquire under what circumstances the revocation had been executed.

THE question in this cause was, whether parties who had engaged to marry and had executed a valid settlement, could afterwards before marriage revoke it.

In March 1844, a marriage had been agreed upon between the Plaintiff *James Page* and *Catherine M. Reid*, who was entitled to a sum of 1500*l.*, secured by a mortgage in fee, vested in her father's executor, in trust for her.

By indenture dated the 14th of March 1844, after reciting the intended marriage, the mortgage was transferred to *Horne* and *Beaumont*, on trust for *Catherine M. Reid*, her executors, administrators, and assigns, until the intended marriage, and after the solemnization thereof, upon the trusts of an indenture of settlement of even date.

By another indenture, also dated the 14th of March 1844, and made between Mr. *Page* of the first part, *Catherine M. Reid* of the second part, and *Horne* and *Beaumont* (trustees) of the third part, after reciting the intended marriage, and that upon the treaty, it was agreed, that the mortgage debt should be transferred to *Horne* and *Beaumont*, upon the trusts after declared, and reciting the transfer, it was thereby declared, that, in consideration of the intended marriage, the trustees should stand possessed of the 1500*l.*, upon trust for *Catherine M. Reid*, her executors, administrators, and assigns, until the said intended marriage should be solemnized,

solemnized, and after the solemnization thereof, upon trust for the separate use of *Catherine M. Reid* during the joint lives of herself and Mr. *Page*, without power of anticipation; and after the death of either upon trust for the survivor for life, with remainder to the children of the marriage; and in default, for the survivor of them, the intended husband and wife.

1846.

PAGE  
v.  
HORNE.

Before the marriage took effect, it was proposed to revoke this settlement, and accordingly, by deed poll dated the 27th of *March* 1844, under the hand and seal of Mr. *Page* and *Catherine M. Reid*, reciting that the said intended marriage had not been yet solemnized, but it was intended shortly so to be, and that the said *Catherine M. Reid*, with the privity of the said *J. A. Page*, was minded and desirous to revoke and make void the trusts contained in the settlement, so far as regarded the sum of 1500*l.*, to the intent that the same might, on the marriage, become vested in *J. A. Page*, by virtue of his marital right:— It was witnessed, that *Catherine M. Reid*, with the privity, &c., and *J. A. Page*, did revoke and annul the trusts of the settlement, so far as regarded the sum of 1500*l.*, and declared that the trustees should hold it, on trust, for *Catherine M. Reid*, to the intent and purpose thereinbefore expressed.

The parties married the next day (28th of *March* 1844). There were no children of the marriage, and the trustees of the settlement having declined to pay over the 1500*l.*, this bill was filed by Mr. *Page* and *Wagstaff* (a mortgagee under him), to obtain payment of the 1500*l.*

Mr. *Kindersley*, Mr. *Turner*, and Mr. *B. Blundell*, for the Plaintiffs. Parties engaged to marry have a right to vary or rescind either a marriage contract or an actual settlement,

1846.  
 PAGE  
 v.  
 HORNE.

settlement, at any time before the marriage actually takes place. Every such a contract is inchoate and ambulatory until the marriage is solemnized. It is clear, they may annul the contract or settlement, by refusing to marry at all; and it follows that they may modify it, by contracting to marry on terms different from those first arranged between them. If it were otherwise, such a contract could never be determined so long as the possibility of a marriage existed, that is, until the death of one of the parties. If the matter rested in contract or articles only, it is settled that they may be varied at any time previous to the solemnization of the marriage, and that it is competent for parties to enter into a new agreement. *Legg v. Goldwire.* (a) If a marriage contract, founded on the valuable consideration of subsequent marriage, be revocable until the marriage, it follows, that an actual settlement founded on the same consideration is equally so. Who has a right to prevent it? The contracting parties themselves have an undoubted right to vary their own agreement, and the possible issue, who, until the marriage, must be regarded as mere volunteers, acquire no interest, not only until the marriage takes place, but until it takes place on the terms ultimately agreed upon between the only parties to the contract. The husband and wife have, therefore, the power of varying their own rights, and of defeating any interest of other persons who are strangers to the contract, and have no interest in the property other than those voluntarily given them. Where two parties enter into an agreement for the benefit of a third, who is no party to the contract, then, although neither of the two can alone defeat the rights of

(a) *Ca. temp. Talb.* 20., and *liams*, 123.; *West v. Errissey*, see *Partyn v. Roberts*, 1 *Ambler*, 2 *P. Williams*, 349. 314.; *Honor v. Honor*, 1 *P. Wil-*

of the third, yet, by agreement between the two, those rights may be destroyed; *Colyear v. The Countess of Mulgrave*. (a)

1846.  
PAGE  
v.  
HORNE.

In *Robinson v. Dickenson* (b), in contemplation of a marriage between *A.* and *B.*, settlements were made of real estate belonging to *B.*, the intended wife, and of personalty belonging to *A.*, the intended husband, upon uses and trusts, which, after the solemnization of the marriage, were to arise for the benefit of the husband, wife, and their issue; the marriage ceremony was performed, and the parties lived together as husband and wife; but, after the lapse of more than a year, and before the parties had any children, the marriage was discovered to be void, and they executed deeds purporting to revoke the former settlement. Some time afterwards, a new settlement, in contemplation of marriage, was made, including the same property as the former, but different from the former in the interests given to the issue, as well as in other provisions; the parties then intermarried, and there was issue of the marriage. It was held, that the first settlement, being founded on mistake and misapprehension, was not binding on the parties, and that the rights of the issue, both as to the real estate and the personalty, were regulated by the second settlement.

In *Beatson v. Beatson* (c), a single lady, having under a will a general power of appointment over a fund, made a voluntary appointment of it to trustees, in trust for her separate use for life, remainder for any husband whom she might marry for life, remainder for her children by any husband or husbands whomsoever.

A few

(a) 2 *Keen*, 81.

(b) 3 *Russell*, 399.

(c) 12 *Simons*, 281.

1846.

PAGE

v.

HORNE.

A few months afterwards, she, being still unmarried, revoked the appointment (although she had not reserved to herself any power to do so), and made another voluntary appointment of the fund to other trustees, in trust, as she should appoint by deed or will. She then married; and afterwards, by virtue of the power reserved to her by the last deed, she executed another voluntary deed, by which she declared that the trustees of the prior deed should stand possessed of the fund, in trust, as she and her husband should appoint, and in default, in trust for her husband and herself for their lives, successively, remainder for their children. The fund still remained in the names of the trustees of the will. The Court, in a suit by the wife and the last-mentioned trustees, against the husband, the trustees of the will, and the trustees of the first-mentioned deed, decreed (with the husband's concurrence) the trustees of the will to transfer the fund to the trustees of the last deed upon the trusts thereof.

Secondly. The right to revoke or alter is expressly provided for by the settlement, for the property is distinctly limited "in trust for *Catherine M. Reid*, her executors, administrators and assigns, until the said intended marriage shall be had and solemnized;" that is, she was to have an absolute power or dominion over the property, not only until the marriage, but until a marriage was solemnized according to the then existing agreement. This left to the lady the absolute power of disposition over the property either until marriage generally, or until a marriage upon the terms then arranged; these were afterwards varied, and the event, taking away the absolute interest, never occurred.

They

They also cited *Ward v. Audland*. (a)

1846.

PAGE  
v.  
HORNE.

Mr. *Hodgson* and Mr. *Renshaw* for the trustees of the settlement. The question in this case is, not whether a variation has been made in the contract, but whether there is to be any settlement at all of the property. The mortgage was vested in the executor of the lady's father, and protected by him; a settlement was made with his consent, and afterwards, without any concurrence on his part, the husband and wife, by a private arrangement between themselves, attempted wholly to defeat it.

The Court has allowed marriage articles to be varied before marriage, but has never gone beyond that. The reason is obvious: when a contract is executory, volunteers cannot compel its performance; but when once it is perfected, and the legal estate has passed, or a valid trust has been declared, the matter is irrevocable, and even volunteers are entitled to insist on the benefit given them; *Petre v. Espinasse* (b), *Bill v. Cureton*. (c) Here, the mortgaged estate in fee was conveyed and vested in the trustees, upon certain declared trusts, to arise on the marriage: the contract was executed and the deed was irrevocable. In *Colyear v. The Countess of Mulgrave*, the whole rested in contract; *Boughton v. Sandilands* (d) shews, that, at law, the first settlement was valid; and the relief in equity was granted on the ground of the mistake (e); and no mistake is here suggested. In *Ward v. Audland*, the legal interest had not passed, and if it had, the remedy was at law, and not in

(a) 8 *Simons*, 571., 8 *Beavan*,  
201., and *C. P. Cooper*, 146.  
(b) 2 *Myl. & K.* 496.

(c) 2 *Myl. & K.* 503.  
(d) 3 *Taunton*, 342.  
(e) 3 *Russ.* 404.

1846.  
 PAGE  
 v.  
 HORNE.

in equity. In *Beatson v. Beatson* (a) there was no contract with any human being, and no consideration at all.

[*The MASTER of the ROLLS.* Suppose, after such a settlement as this, the parties had agreed not to marry, and had released each other from their engagements, and had married other persons, and had afterwards become single and then married; in such a case could the trusts of the first settlement be revived?]

Some such question arose in a recent case of *Thomas v. Brennan* before the Vice-Chancellor *Knight Bruce*. (b) Next, it is argued, on behalf of the Plaintiffs, that there being a limitation to the lady, her executors and administrators until the marriage, she retained the absolute dominion over the property, and had, therefore, the power of dealing with it as she pleased; but it is to be observed, that the absolute limitation was subject to the limitation to arise on the marriage taking effect, and which she had no power to defeat, and that it was the mere resulting trust, which she would have taken in the absence of any direct expressed trust. The property was hers absolutely, subject to the rights she had created, and to arise upon her marriage with Mr. *Page*.

Mr. *N. Wetherell*, for Mr. *Dobell*.

Mr. *Milne* for Mr. *George*, the mortgagor.

Mr. *Follett*, for Mrs. *Page*, submitted her rights to the judgment of the Court.

Mr. *Kindersley*, in reply. It is argued you may vary, though not revoke; but if you admit the one, the other must necessarily follow. Until the marriage takes place, the

(a) 12 *Simons*, 281.

(b) 6 *June* 1846.

the consideration does not arise; for then, and then only the marriage consideration springs up; but when it has once taken place, I admit that the ultimate agreement cannot be varied in the least particular. *Bill v. Cureton* and *Petre v. Espinasse* do not apply; they were not cases of a marriage consideration. It is implied by a marriage settlement, that it is only to have effect in the event of the marriage. The parties may either say "we will not marry at all," and thus destroy the settlement, and call for a retransfer of the property; or they may say "we will marry on different terms" and thereby vary it to any extent, even to the extent of revoking it.

1846.

PAGE  
v.  
HORNE.

*The MASTER of the ROLLS.*

I will take time to consider this important question.

If this were a contract between the parties themselves, wholly irrespective of others, and if for some common purpose property was vested in trustees to answer certain events, then, no doubt, by agreement between themselves, they would have a right to have their property returned to them by the trustees. It is the interests of others which alone makes any question. There was a contract for a marriage between these parties, and property was vested in trustees for the purpose of that marriage; there was a limitation for the benefit of the lady until the marriage, and then limitations for the benefit of herself, her husband, and the issue of the marriage. Having executed this settlement with a view to the marriage; the husband and wife, subsequently, by themselves, in another place and in the presence of other persons, execute a deed by which they wholly revoke the settlement; and immediately afterwards, the marriage, which was in contemplation when the contract was entered into, was solemnised.



1846.

PAGE  
v.  
HORNE.

What is said on one side is, that persons who contract to marry, subject to certain terms as regards their property, have a right, until the marriage is solemnised, to alter those terms; that they have the power of disposing of their own property and of altering all the arrangements which have been made, and even to revoke it so effectually, as to give the property to the husband *jure mariti*.

On the other hand, the trustees say, "You vested the property in us, the deed is executed and the property is legally vested in us on certain trusts, in the event of the marriage taking place. These trusts are irrevocable; you have made this settlement in contemplation of a marriage, and if it takes place, the trusts are absolute. You may put an end to it by putting an end to the contract of marriage, but marrying as you have done, we, the trustees, must perform the trusts we have undertaken."

I have to determine, under these circumstances, the right of the Plaintiffs to have this money.

I agree that the authorities do not directly decide this point, and that this case must be considered on its own merits.

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July 29.

*The MASTER of the ROLLS.*

All I can do in this case is, to refer it to the Master to enquire and state to the Court, under what circumstances the deed of revocation was executed, with liberty to state special circumstances.

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NOTE.—" Nous remarquerons, dans les conventions matrimoniales, deux caractères qui leur sont propres.

*Premier caractère.*—" Le premier caractère, qui est propre à toutes

les conventions matrimoniales, et aux donations faites par ces contrats de mariage, est, qu'elles sont toutes censées faites sous la condition tacite, *si nuptiæ sequantur* : c'est pourquoi, si les promesses de mariage, que les parties se sont faites, viennent à se rompre, toutes ces conventions et donations deviennent nulles, et sont regardées comme non avenues, *quasi ex defectu conditionis*."

"*Second caractère*.—Un second caractère, qui est propre aux conventions matrimoniales, et aux donations portées par les contrats de mariage, est, qu'aussitôt qu'elles ont été confirmées par la célébration du mariage qui a suivi le contrat, il n'est plus permis aux parties d'y déroger en rien, même par leur consentement mutuel." 6 *Pothier* (Ed. *Dupin*), 46. 47.

1846.

PAGE  
v.  
HORNE.

RYVES v. The Duke of WELLINGTON.

June 6. 8. 10.

July 28.

**T**HIS cause came before the Court on general demurrer to the bill.

The bill stated an act of the 40 *G. 3. (a)*, by which, —after reciting acts of the 1 *Anne, c. 7.*, the 1 *G. 3. c. 1.*, and the 34 *G. 3. c. 75.*, and after reciting, amongst other things *(b)*, that it was his Majesty's most gracious desire, that all such personal estate and effects as his Majesty should be possessed of or entitled at the time of his demise, and over which he should have the full

A legatee, claiming under an alleged will of *George III.* under his sign manual, in pursuance of the 40 *G. 3. c. 88. s. 10.*, filed a bill against the executor of *George IV.*, alleging that *George IV.* and his executors had possessed the

(a) *C. 88.*

(b) *S. 10.*

assets of *George III.*, and it alleged that the will had not been, and, being a sovereign's will, could not be proved. A demurrer was allowed, on the ground, that until the will had been proved, this Court had no jurisdiction; and, *semble*, that the proper remedy against *George IV.* would have been by petition of right.

The absence of a remedy for a supposed wrong in another place is not, of itself, any reason for this Court assuming a jurisdiction on the subject. The case must be such as to bring it properly within the jurisdiction of this Court on other grounds.

It is not competent to the King, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right. *Semble*.

1816.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

and absolute power of disposition by his last will and testament, should be subject and liable to the payment of all such debts of his Majesty as should, during his lifetime, be properly payable out of his privy purse: And further reciting, that it was reasonable that all such personal estate as any of his Majesty's successors, Kings and Queens of this realm, should be possessed or entitled to, in like manner, should also be subject and liable to the like charge, and that it was expedient to fix and regulate what personal estate and effects of his Majesty and his successors were subject to such testamentary disposition, and in what form such disposition should be made,—it was, amongst other things, enacted and declared, that all such personal estate of his Majesty and his successors, respectively, as should consist of monies which might be issued or applied for the use of his or their privy purse, or monies not appropriated to any public service, or goods, chattels, or effects which had not, or should not come to his Majesty, or should not come to his successors, respectively, with or in right of the Crown of this realm, should be deemed and taken to be personal estate and effects of his Majesty and his successors, respectively, subject to disposition by last will and testament, and that such last will and testament should be in writing, under the sign manual of his Majesty and his successors, respectively, or otherwise should not be valid; and that all and singular the personal estate and effects whereof or whereto his Majesty, or any of his successors should be possessed or entitled, at the time of his and their respective demises, subject to such testamentary disposition as aforesaid, should be liable to the payment of all such debts as should be properly payable out of their privy purse, and that subject thereto, the same personal estate and effects of his Majesty and his successors, respectively, or so much thereof respectively as should not be given  
 or

or bequeathed or disposed of as aforesaid, should go in such and the same manner, on the demise of his Majesty and his successors, respectively, as the same would have gone if the said act had not been made. And it was further enacted, that any instrument in writing made and executed by his Majesty before the passing of the said act, as and for his last will and testament or a codicil thereto, in manner and form thereinbefore provided, should be as effectual to dispose of the property, real or personal, intended to be disposed of thereby, as if the same had been made after the passing of the said act.

1846.  
RYVES  
v.  
The Duke of  
WELLINGTON.

The bill then stated, that his late Majesty King *George III.* duly made his last will and testament in writing, under his sign manual, bearing date the 2d day of *June 1774*, and thereby bequeathed a legacy or sum of 15,000*l.* to his niece, her Highness *Olive* daughter of his said late Majesty's brother, *Henry Frederick* Duke of *Cumberland*. But his said late Majesty did not, by his said will, appoint any executor, or dispose of the residue of his personal estate and effects.

That the said will was duly attested by three witnesses, to wit, by *James Dunning* afterwards Lord *Ashburton*, the then Earl of *Chatham*, and the then Earl of *Warwick*.

That the said will under the sign manual of his late Majesty and attested as aforesaid was in the words and figures following, that is to say:

*George R.*

*St. James.*

In case of our royal demise, we give and bequeath to *Olive*, our brother of *Cumberland's* daughter, the sum of 15,000*l.*, commanding our heir and successor to pay the same, privately, to our said niece, for her use, as a

*Pp 3*

recompence

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

recompence for the misfortunes she may have known  
 through her father.

June 2, 1774.

Witness, *J. Dunning, Chatham, Warwick.*

That King *George III.* departed this life on or about  
 the 29th day of *January*, 1820, without having revoked  
 or altered his said will, and that he left his said niece  
*Olive*, (in the said will named), the daughter of his said  
 brother, the said Duke of *Cumberland*, him surviving.

That King *George III.* left his eldest son, his then  
 Royal Highness *George Augustus Frederick* Prince of  
*Wales*, Regent of the United Kingdom of *Great Britain*  
 and *Ireland*, his heir and successor; and that, on the  
 demise of his said late Majesty King *George III.*, his  
 said son and heir succeeded to the throne of the said  
 United Kingdom, and became King *George IV.*

That King *George III.* was, at the time of his demise,  
 possessed of personal estate, consisting of monies issued  
 or applied for the use of his privy purse, monies not  
 appropriated to any particular service, and goods, chat-  
 tels, and effects which did not come to his said late  
 Majesty King *George III.* with or in right of the Crown  
 of this realm, and that the monies, goods, chattels,  
 personal estate and effects aforesaid, of or to which  
 King *George III.* died possessed, were, by law, subject  
 to disposition by his will, and that on the demise of  
 King *George III.*, King *George IV.*, became entitled  
 thereto, subject to the payment thereof of the aforesaid  
 legacy of 15,000*l.*

That the monies, goods, chattels, personal estate and  
 effects, which King *George III.* died possessed of, were  
 possessed by or came to the hands of King *George IV.*,  
 and

and to an amount amply sufficient, and more than sufficient, to answer and satisfy the aforesaid legacy of 15,000*l.*; but King *George IV.* never paid the said legacy, or caused the same to be paid, and that the same still remained unpaid, with all interest thereon.

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

That in or as of *Trinity* Term 1822, her said Highness *Olive*, Princess of *Cumberland*, as the legatee, and only legatee named in the will aforesaid of King *George III.*, promoted and brought a suit in the Prerogative Court of *Canterbury*, intituled “In the goods of his late Majesty King *George III.* deceased,” in which suit, application, by motion, was made, by or on behalf of her said Highness, to the said Prerogative Court, to issue its citation, calling upon the Procurator General of his said then Majesty King *George IV.* as heir and successor of his said late Majesty King *George III.*, deceased, to see the said will of his said late Majesty King *George III.*, bearing date the said 2d day of *June* 1774, propounded and proved in solemn form of law. (*a*)

The bill then stated the evidence adduced in support of such application, and proceeded :

That the said Prerogative Court, upon being moved as thereinbefore stated, directed the matter to stand over, on account of the special nature of the application, and that his Majesty’s Advocate should, in the meantime, be instructed to shew cause against the issue of the citation applied for.

That the matter stood over accordingly, and counsel were heard on the two succeeding Court days, both in support

(*a*) 1 *Addams*, 255.

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

support of and in opposition to the issue of the process as prayed. And that on the fourth session of *Trinity* Term 1822, the Judge of the said Prerogative Court, (Sir *John Nicholl*) pronounced judgment respecting the said application.

That no affidavit was filed or sworn in opposition to the said motion, or in opposition to the aforesaid affidavits sworn in support of the said motion, or any of them, and the said application was not rejected upon the ground of any doubt of the said will being a valid and genuine will, but was rejected solely upon the ground, that there was no instance of probate ever having been granted by the said Prerogative Court of the will of any King of this realm, or of the said Court ever having issued or granted process of citation to come in and see the will of any King of this realm propounded and proved:—that, notwithstanding the aforesaid act of parliament of the 39 & 40 G. 3. gave, or at least regulated, the sovereign's right to dispose of his property by will, the said act, nevertheless, did not give the said Prerogative Court any jurisdiction to compel or admit probate of the will of any sovereign of this realm, or any jurisdiction to issue or grant citation against any person or persons, to come in and see the will of any sovereign of this realm propounded or proved.

That, for the reasons aforesaid, probate had never been granted, nor could be obtained, of the will aforesaid of King *George III.*, nor could probate be obtained, from or out of the said Prerogative Court, of any will of any sovereign of this realm.

That King *George IV.* departed this life on or about the 26th *June* 1830, having duly made his last will and  
 testament

testament in writing, under his sign manual, and thereby appointed His Grace *Arthur Duke of Wellington*, and Sir *William Knighton*, Bart. (since deceased), executors thereof.

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

That probate of the said will of King *George IV.* had never been granted by or out of the Prerogative Court of *Canterbury*, or any other Ecclesiastical Court; and that probate of the same could not be obtained, for the reason hereinbefore explained.

That, after the demise of King *George IV.*, the said Sir *William Knighton* departed this life, and that the Duke of *Wellington* was the sole surviving executor under the will aforesaid of King *George IV.*

That King *George IV.* was, at the time of his demise, possessed of or entitled to personal estate, consisting of monies issued or applied for the use of his privy purse, and monies not appropriated to any particular service, and goods, chattels and effects, which did not come to King *George IV.*, with or in right of the Crown of this realm; and that the personal estate and effects, of which King *George IV.* died possessed, consisted, in part, of the monies, goods and chattels, personal estate and effects aforesaid, whereof King *George III.* died possessed.

That the personal estate and effects aforesaid, whereof King *George IV.* died possessed, were of very large amount, and were, by law, applicable to the payment of, and were amply sufficient and more than sufficient for the payment of all such debts of King *George IV.*, as were payable out of his privy purse, including what, under the circumstances aforesaid, was due from King *George IV.*, in respect of the said legacy of 15,000*l.*

That



1846.  
RYVES  
v.  
The Duke of  
WELLINGTON.

That the Duke of *Wellington* took upon himself the executorship of the will of King *George IV.*, and had acted as the executor of King *George IV.*, and that, as executor of King *George IV.*, the said Defendant had possessed himself of personal estate and effects, of or to which his said late Majesty King *George IV.* died possessed or entitled, consisting (amongst other things) of personal estate and effects whereof King *George III.* died possessed, and to a very large amount, and amply sufficient and more than sufficient to pay and satisfy all such debts of King *George IV.*, as were payable out of his said late Majesty's privy purse, including what, under the circumstances aforesaid, was due from King *George IV.* in respect of the said legacy of 15,000*l.* and the interest thereof.

That the said Defendant had not paid the said legacy, and that the same still remained unpaid, with all interest thereon.

The bill then stated the will of *Olive*, Princess of *Cumberland*, by which she bequeathed the legacy of 15,000*l.* to her executors and executrix, and her death in 1834; and that the Plaintiff and *Primrose* had proved her will. The bill stated applications for payment, and contained charges as to the genuineness of the will, and as to the fact, that *Olive* was really the daughter of the Duke of *Cumberland*, and niece to King *George III.*

The bill prayed an account of the legacy of 15,000*l.* and that the Duke of *Wellington*, as executor of King *George IV.*, might be decreed to pay the same, and in case he should not admit assets of *George IV.*, then for an account of the personal estate and effects of King *George IV.* (including therein the personal estate and effects

effects aforesaid of King *George III.*, whereof King *George IV.* was possessed at the time of his decease), possessed by the Duke of *Wellington*.

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

To this bill the Duke of *Wellington* filed a demurrer for want of equity, and further on the ground "that the matters contained in the said bill were not cognisable by this Court."

Mr. *Turner* and Mr. *Elmsley* in support of the demurrer. First, this claim is barred by the Statute of Limitations, which may be taken advantage of by demurrer: *Hoare v. Peck* (a), *Foster v. Hodgson* (b), and *Bampton v. Birchall*. (c) By the fortieth section of the 3 & 4 W. 4. c. 27. it is enacted, that no suit is to be brought but within twenty years after a present right to receive the same shall have accrued to some person, and this section, notwithstanding the peculiar wording of the statute, has been held to apply to legacies and residues, though not connected with real estate: *Sheppard v. Duke* (d), *Prior v. Horniblow* (e), *Piggott v. Jefferson* (g), and the act extends to spiritual Courts, s. 43. The remedy is gone, though we admit the right is not extinguished by the 34th section. It will be argued that there has been a disability to sue, there having been no executor or legal personal representatives of *George III.* to sue, but here "the heirs and successors" of King *George III.* were commanded to pay the legacy privately, and if King *George IV.* were liable in any character, the remedy was by petition of right which is applicable to personal estate: *Staundeford's Prerogative*. (h)

*Blackstone,*

- (a) 6 *Simons*, 51.
- (b) 19 *Ves.* 180.
- (c) 5 *Beavan*, 67.
- (d) 9 *Simons*, 567.

- (e) 2 *Y. & C. (Exc.)* 200.
- (g) 12 *Simons*, 26.
- (h) c. 22, fo. 76.

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

*Blackstone*, in his *Commentaries*, observes, "The common law methods of obtaining possession or restitution from the Crown of either real or personal property are, 1. By petition *de droit*, or petition of right, which is said to owe its original to King *Edward I.* 2. By *monstrans de droit*, manifestation or plea of right, both of which may be preferred or prosecuted either in the Chancery or Exchequer. The former is of use where the King is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself." (a)

In *Comyn's Digest* (b) it is said :—"The King cannot be sued by writ, for he cannot command himself. 4 Co. 55. a."

"And, therefore, where the King is seised by matter of record, or by matter of fact found by office upon record, he who has right shall be, by the common law, put to his petition of right, in the nature of a real action, to be restored to his inheritance, or freehold. R. 4 Co. 55. a. R. per all the J., 4 H. 7., 7. b."

"So in all cases where the King seizes the lands or goods of a subject, without due order of law: *Stamf. Prær.* 72. b."

Secondly, the *factum* of this pretended will has never been established. This Court merely acts as a Court of construction, and takes no cognisance of a testamentary instrument, relating to personalty, until it has been proved to be such by the Ecclesiastical Court. It is alleged that it cannot be proved, but the Court is not bound

(a) 3 Comm. 256.

(b) *Prerogative*, D. 78.

bound to take this allegation of law to be true. It is not the fact that this was decided in the case of "In the goods of his late Majesty *George III.*" (a) What was decided was this, that neither the King nor his proctor could be cited to see a testamentary paper propounded and proved.

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

It is by no means correct to say, that the will of a sovereign cannot be proved. The will of *Edward III.* (b) appears to have been proved a few days after his death. The fact is thus stated: — "Probatio dicti Testamenti coram D'no Simone Cant.' Archiep.' apud *Lambeth*, 25th June 1377." Regist. *Sudbury*, fol. 97. b., 98. a. b. in the Archiepiscopal Registry, *Lambeth.* (c)

But if the Spiritual Courts have no jurisdiction to decide the *factum* of the will, *à fortiori* the jurisdiction of this Court is excluded.

But, admitting the will of *George III.* could not have been proved in the lifetime of *George IV.*, still upon his death, his executors, being subjects, might have been cited and his will proved.

They also referred to the following passage in Lord *Coke.* (d) "The bishops, lords, and commons assented, in full parliament, that the King, his heirs, and successors might lawfully make their testaments, and that execution shall be done of the same whereof some doubt was made before. See rot. par. 1 *H. 5.* nu. 13.  
 the

(a) 1 *Addams*, 255.

(c) *Ib.* page 64.

(b) A collection of the wills of the Kings and Queens of *England*, printed by *J. Nichols*, 1780.

(d) 4 *Inst.* c. 74. p. 337.

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

the testament of King *H. 4.* and his executors (*a*) refused, the Archbishop of *Canterbury* was to grant administration, with the testament annexed to the same. (*b*) See 1 *H. 6.* nu. 18. the last will and executors of *H. 5.*, 10 *H. 6.* nu. 27."

"When the King is made an executor of the last will and testament of any other, the King doth appoint certain persons to take the execution of the will upon them (against whom such as have cause of suit may bring their action), and appointeth others to take the account. See rot. par. 15 *H. 6.* *Katherine*, Queen Dowager of *England*, mother of *H. 6.*, made her last will and testament, and thereof constituted King *H. 6.* her sole executor. And thereupon the King appointed *Robert Rolleston*, clerk, keeper of the great wardrobe, *John Merston* and *Richard Alreed*, Esquires, to execute the said will by the oversight of the Cardinal, the Duke of *Gloucester*, and the Bishop of *Lincoln*, or two of them, to whom they should account."

Thirdly. The object of this bill is to administer two estates, namely, that of King *George III.* and of King *George*

(*a*) He appears to have appointed his son, *Henry V.*, his executor. The passage in his will is as follows:—"And for to execut this testament well and trulich, for grete tryst that I have on my son the Prince, y ordeyne and mak him my executor of my testament foreseyd, kalling to him soche as him thinkyth in his discrecion, that can and will labor to the sonnest spede of my will comprehended in this myn testament. And to

fulfil trewly all things foresaid, y charge my foresaid son upon my blessyng." *Royal Will*, p. 204.

(*b*) Quant le roy *Henric* le quart morust lopinion de plus justic et doctors de Canon et civile assembles en lescheker chamber fuit que il puit faier testamt et legacy des bns q il av. Mes des bns de roialme. s. ancien coronurs et Juels il ne puit, &c. *Fitzh. Abridg. Executor*, n. 108.

*George IV.*; that cannot be done in the absence of their legal personal representatives. In *Tyler v. Bell* (a), Lord *Cottenham* observes, "that an estate cannot be administered in the absence of the personal representatives, and that such personal representatives must obtain his right to represent the estate from the Ecclesiastical Court in this country, has, I think, never been doubted."

1846.  
RYVES  
v.  
The Duke of  
WELLINGTON.

Mr. *Kindersley*, Mr. *Cockburn*, Dr. *Addams*, Dr. *Bayford*, Mr. *Lovat*, and Mr. *G. M. Dowdeswell*, in support of the bill.

First. The Statute of Limitations has no application to the present case, for until the death of *George IV.* in 1830, there was no person against whom the present claim could be enforced, and the statute has no operation until a party is in *esse* against whom the claim can be capable of being sued adversely: *Murray v. East India Company* (b), *Douglas v. Forrest* (c).

A sovereign could not be sued, and although a party may present a petition of right, still it is not a matter of right, *ex debito justitiæ*, but of grace and favour in the Crown to refer it to the Chancellor: the sovereign may wholly refuse to interfere. The statute of limitations relates to ordinary suits and actions, and not to a remedy against the sovereign: *The Baron de Bode v. The Queen*. (d)

Secondly. It is said that there is no proof of the *factum* of the will, and that it has not been proved in the Ecclesiastical Court, but the answer is, that in the case of

(a) 2 *Myl. & Cr.* 89., and 1 *Keen*, 826.

(b) 5 *Barn. & Ald.* 204.

(c) 4 *Bing.* 686.

(d) 8 *Q. B. R.* 208.

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

of the will of the sovereign, probate is unnecessary, as well as impossible; it is a case of exception. The right of the Plaintiff is a statutory right, given to the subject by the 40 G. 3. c. 89, in respect of which no jurisdiction is given to the Ecclesiastical Courts. The will is to be evidenced by writing, under the sign manual, and effect is to be given to that right in this Court. There is no instance of a sovereign's will having been proved, except that of *Edward III.*, but there the sovereign was not the executor. (a)

Looking at the origin of the jurisdiction of the Ecclesiastical Court in matters of probate, it is clear that that Court can have no jurisdiction over the will of a sovereign.

In ancient times, the right of granting administration belonged to the King, and was exercised in the County Court, where the bishop and sheriff sat together, and afterwards, either by usurpation or grant, the Church exercised this branch of the prerogative. It cannot be supposed that any King, in granting this right to the church, intended to give a power not possessed by the County Court, of impleading himself and his successors, or to give a jurisdiction over the property of the Crown, which, on the demise of the Crown, vests, by prerogative in the successor, besides which there would be this difficulty, that in contemplation of law, the king never dies, and therefore there would be no property over which the probate, if granted, would operate. The origin of the jurisdiction of the Ecclesiastical Courts is stated in

*Marriot*

(a) Hujus siquid'm testamenti n'ri regii executores nom'iamus, facim', et deputamas p'clarum videl't filium n'rm, Johannem regem Castelle et Legionis,

ac duces Lancastrie illustrem ven'rabilesq' p'res Joh'em ep'm Lincolinen', &c. *Royal Wills*, page 63.

*Marriot v. Marriot* (a) and in *Hensloe's Case* (b), where Lord Coke, speaking of the jurisdiction of the Ecclesiastical Court, says, "as to that, it is to be known, that it is held, in 2 R. 3. *Testament* 4, that it is but of late years that the church had the probate of wills in this land, until it was, by an act, &c., for lay people have probate of wills in all other places except *England*; and in many places in *England* the lords of manors have probate of wills at this day, in their temporal courts. And *Tremail* there said, that he is steward in his country, and the free tenants and bondmen prove their wills before him in the Court Baron, and so it has been used from time whereof &c.; and therewith agreed *Fineux* and all the justices in 11 H. 7. 12. b., that the probate of testaments belonged not to the Spiritual Court but of late &c., and they have it not by the spiritual law. And *Linwood*, who was Dean of the Arches, and wrote anno Dom. 1422, in the reign of King H. 6. lib. 3. tit. *De Testamentis*, fo. 124. 1. confesses, that probate of wills belongs to the ordinaries, *de consuetudine Angliæ et non de communi jure*, and that in other realms the ordinaries had it not; and in another place he affirms, the power of the Bishop in probate of wills *per consensum Regis et suorum procerum ab antiquo*. And I have a book published in Latin anno Dom. 1573, by the most reverend prelate *Matthew Parker*, Archbishop of *Canterbury*, very expert in matters of antiquity, in which it is affirmed in these words: — *Rex Angliæ olim erat conciliorum ecclesiasticæ præses, vindex temeritatis Romanæ, propugnator religionis, nec ullam habebant Episcopi auctoritatem præter eam quam a Rege acceptam referebant, jus testamenta probandi non habebant, administrationis potestatem cuique delegare non poterant*. Then, forasmuch as probate of wills is given to the Spiritual Court, whereof they had

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

not

• (a) 1 *Strange*, 666., 1 *Wms. on Executors*, 236. (1st ed.) (b) 9 *Rep.* 37 b.



1846.

  
 RYVES

 v.  
 The Duke of  
 WELLINGTON.

not jurisdiction before, when they have proved the will, their authority is executed."

In a subsequent passage (a) Lord *Coke* observes: "Now, it is necessary to know two things: — 1. What the law was before the stat., and, 2. What alteration the stat. of 31 *E. 3.* has made; and as to the first, three points are to be observed. 1. That of ancient time, as appears by record, when a man died intestate, and had made no disposition of his goods, nor committed his trust to any, in such case the King, who is *parens patriæ*, and has the supreme care to provide for all his subjects, that every one should enjoy that which he ought to have, used by his ministers to seize the goods of the intestate, to the intent they should be preserved and disposed for the burial of the deceased, for payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood. And this appears in *Rot. Claus. de 7 H. 3. m. 16.*, *Bona intestatorum capi solebant in manu Regis* &c. And afterwards, this care and trust was committed to ordinaries, for none could be found more fit to have such care and charge of his transitory goods, after the death of the intestate, than the ordinary, who all his life had the cure and charge of his immortal soul, as it is said in *Plow. Com. 280*, in *Griesbrook's* case. And, therefore, he was to this purpose constituted *in loco parentis*: and that appears by what has been said before, and also by the constitution of *John Stratford*, Archbishop of *Canterbury*, at a synod in *London*, anno Dom. 1380, where he confessed, that the administration of the goods of an intestate was granted to ordinaries *concensu Regis et Magnatum regni*."

Thirdly. As to the absence of a legal personal representative duly appointed by the Prerogative Court,  
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(a) 9 *Rep.* 38 b.

the same observations are applicable as to the second objection. It is impossible to obtain one. Here the bill states, and the demurrer admits, both the validity of the will containing a bequest of the legacy, and the possession of assets to pay it. Suppose a sovereign were, under this act of parliament, to bequeath a legacy of 100,000*l.* to his daughter, and to appoint *A. B.* a subject, his executor, and *A. B.* possessed the assets. The statute would be an answer to the claim of the succeeding sovereign, and then, according to the argument on the other side, such daughter would have no remedy whatever against *A. B.*, for the Ecclesiastical Court could not interfere, a court of law would have no jurisdiction, because the matter is legatory, and this Court would have no authority to interfere without probate. The result would be that the executor might retain the assets against all the world. Will this Court permit a party having the assets in his pocket, which, by an act of parliament, are made liable to the just demands of legatees and creditors, to say, I have not proved and I cannot prove the will, but I will retain the whole assets for myself, regardless of the claims of both legatees and creditors? The possession of the property affected with a trust is sufficient to give jurisdiction, and the King himself may be a royal trustee: *Penn v. Lord Baltimore.* (a)

1846.  
RYVES  
v.  
The Duke of  
WELLINGTON.

They referred also to *Swinburne*, part 3. § 27., and to the following passage in *Godolphin*: — “ Whether kings and sovereign princes may make their testaments, is resolved in the affirmative: but of what things is such a *quæstio status*, as is safest resolved by a *Noli me tangere*. Suffice it, therefore, in this *supra nos*-point, to say no more than what the Lord *Coke* asserts,  
*viz.*

(a) 1 *Ves. sen.* 453. (4th edit.)

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

*viz.* That the king, his heirs, and successors may lawfully make their testaments, and that execution shall be done of the same." (a)

On general principles if there be a right this Court will provide a remedy. (b)

"If the Plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal:" per Lord Holt, *Ashby v. White*. (c)

Mr. Turner in reply.

The other authorities referred to during the argument were —

*Viscount Canterbury v. Attorney General* (d), *Bankers' Case* (e), *Richards v. Richards* (g), *Rhodes v. Smethurst* (h), *Penn v. Lord Baltimore* (i), *Magna Charta* (k), *Charter of Richard I.* (l), *Webster v. Webster* (m), *Lambert v. Taylor* (n), *The Duke of Brunswick v. The King of Hanover* (o), *Sadler's Case* (p), *Lewin on Trusts* (q), *Reeve v. Attorney General* (r).

The MASTER of the ROLLS. I will take time to consider this case.

The

(a) *Godolphin's Orphan's Legacy*, part I. ch. 7.

(b) *Mitford* (4th ed.), p. 223, 224., *Beames on Pleas*, 64. 89. 90., *Fonblanque*, 15.

(c) 2 *Lord Raymond*, p. 938.

(d) 1 *Phillips*, 306.

(e) 14 *State Tr.* 39.

(g) 2 *B. & Ad.* 447.

(h) 4 *Mee. & W.* 42.

(i) 1 *Ves. sen.* 444.

(k) 9 *Hen. 3. c.* 17.

(l) Stated in 1 *Strange*, p. 669.

(m) 10 *Vesey*, 93.

(n) 4 *Barn. & Cr.* 138.

(o) 6 *Beavan*, 1.

(p) 4 *Rep.* 54. b.

(q) 73. (2nd ed.)

(r) 2 *Atkins*, 223.

*The MASTER of the ROLLS.*

This bill alleges, that his late Majesty King *George III.* made a will, dated the 2d of *June* 1774, under his sign manual, and attested by three witnesses, and that such will was expressed as follows: — “*St. James’, George R.* In case of our royal demise, we give and bequeath to *Olive*, our brother of *Cumberland’s* daughter, the sum of 15,000*l.*, commanding our heir and successor to pay the same privately to our said niece, for her use, as a recompense for the misfortunes she may have known through her father. *June 2. 1774.*”

1846.  
RYVES  
The Duke of  
WELLINGTON.  
July 28.

The bill states the act 39 & 40 *G. 3. c. 88.*, which enacted, that such personal estate of his Majesty as is therein mentioned should be deemed and taken to be subject to disposition by the King’s last will in writing under his sign manual, and should be liable to the payment of such debts as therein mentioned, and subject thereto, should go in the same manner, on the demise of his Majesty, as if the act had not been made. The bill further states, that his late Majesty King *George III.* departed this life on the 29th of *January* 1820, without having revoked his alleged will, leaving *Olive*, therein named, and who, on this record, is called her Highness *Olive*, Princess of *Cumberland*, him surviving. And that his late Majesty King *George IV.* was the heir and successor of King *George III.*, and succeeded to his throne and possessed such personal estate of King *George III.*, as by the statute was made subject to his disposition by will, more than sufficient to pay the legacy; but that the legacy was not paid.

The bill then states, that his late Majesty King *George IV.* died on the 26th of *June* 1830, having made

Q q 3

a will,

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

a will, whereby he appointed the Defendant, his Grace the Duke of *Wellington*, and Sir *William Knighton*, Bart. (since deceased), executors thereof. That no probate of the same will has been granted, or can be obtained out of the Prerogative Court of *Canterbury*, and that the Defendant, the Duke of *Wellington*, is now the sole surviving executor of the will of King *George IV.*, and has possessed his personal estate, (including therein the personal estate of King *George III.*), more than sufficient to pay the legacy claimed, which, however, has not been paid.

The bill then states, that her Highness *Olive*, Princess of *Cumberland*, died on the 21st of *November 1834*, having made a will, whereby she specifically bequeathed the alleged legacy of 15,000*l.* and all interest accumulated thereon to her executrix and executors, and she appointed the Plaintiff and *George Darling*, *Richard Done*, and the Defendant *John Primrose*, executors of her will, which was proved by the Plaintiff and the Defendant, *John Primrose*, alone.

The bill prays for an account of what is due to the Plaintiff and the Defendant *Primrose* for the legacy and interest thereon; and that the Duke of *Wellington* may be decreed to pay the amount; and if he shall not admit assets, that an account may be taken of the personal estate of King *George IV.* (including therein the personal estate of King *George III.*, whereof his late Majesty King *George IV.* was possessed at the time of his decease), possessed by the Duke of *Wellington*, or any person, by his order or for his use, and for further relief.

To this bill, the Duke of *Wellington* has put in a general demurrer for want of equity, and for that  
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the matters contained in the bill are not cognizable by this Court.

1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

And I am of opinion that the demurrer must be allowed.

It is not denied, that, in ordinary cases, this Court has no jurisdiction to determine upon the validity of a will of personal estate, and that in all cases in which parties apply for the construction of a will, or for payment of legacies under a will, this Court proceeds only on the foundation of a will proved in a Court of competent jurisdiction. The present is, as far as I know, the first instance, in which an attempt has been made to obtain in this Court a decree for the payment of a legacy, under a will of personal estate not proved in a proper Court.

I do not think that it is necessary, or that it would be useful, on this occasion, to trace the history of the jurisdiction exercised by other Courts in the establishment of the validity of testamentary instruments; or the history of the jurisdiction of this Court, in making decrees for the payment of debts and legacies, and for taking the accounts which are ancillary to those objects.

The Court does interfere for the protection of property *pendente lite* for probate or letters of administration, and does, perhaps sparingly, and with great caution, exercise some jurisdiction in some cases of fraud (a) practised in obtaining probate and legacies or of spoliation; but relief, under a will produced, is given only in cases where grants have been made of probate or of letters of administration. And, unless there

(a) *Allen v. M<sup>c</sup>Pherson*, 5 *Beavan*, 469. and 1 *Phillips*, 133.



1846.  
RYVES  
v.  
The Duke of  
WELLINGTON.

there be something to take this case out of the common rules, it is a sufficient objection to this bill, that it seeks payment of a legacy, under a will of personal estate, of which it alleges that there neither is, nor can be, any probate.

I must, upon this record, at least, treat the instrument upon which the claim is founded as a will or testamentary instrument: it is not a declaration of trust, or an appointment *inter vivos*.

It was argued, that if no remedy can be obtained here, the law of *England* does not afford any remedy for an alleged wrong such as is stated on this record. I may observe, that the absence of a remedy for a supposed wrong in another place, is not, of itself, any reason for this Court assuming a jurisdiction on the subject; the case must be such as to bring it properly within the jurisdiction of this Court on other grounds.

But, I apprehend that this case is not such, that, if a remedy here be refused, the party is necessarily deprived of all remedy. As regards his late Majesty King *George IV.*, the Plaintiff's claim against him was for the performance of a personal duty, involving his pecuniary interest. Is there any reason, why a petition of right might not have been presented? I am far from thinking, that it is competent to the King, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right. The form of the application being, as it is said, to the grace and favour of the King, affords no foundation for any such suggestion. I conceive, that if the Lady, who on this record is called the *Princess Olive of Cumberland*, had  
a just

a just claim against the personal estate of King *George III.* in the hands of King *George IV.*, she might have brought forward her claim in the form of a petition of right, and that the claim would have been investigated, and if proper put into a due course of trial and determination, in a lawful manner, through the medium of the King's Courts, to which it might have been so referred, as to give the jurisdiction which they otherwise would not have had.

1846.  
RYVES  
v.  
The Duke of  
WELLINGTON.

I do not think that the death of King *George IV.*, who made a will, and thereof appointed executors, made any difference in this respect. The claim is in respect of a duty, which, it is said, ought to have been performed personally by King *George IV.*, and out of an estate in which Her present Majesty, as successor of *George III.*, has, or may have, an interest which is not to be affected by the ordinary proceeding against her in her Courts of Justice; and if it be true, that, for such reasons as are stated, no probate can be granted of the will of King *George IV.*, of which he appointed executors, I think that the reason is equally good for saying, that this Court has no inherent jurisdiction to decree the payment of debts, by the executors of *George IV.* out of his estate, or to take any account thereof.

I am of opinion that there is nothing to take this case out of the ordinary rule, which requires a will to be proved in a proper Court before relief is given under it in this Court.

The Court has never exercised, and has no jurisdiction to exercise, any authority for the purpose of establishing wills of personal estate.

And



1846.  
  
 RYVES  
 v.  
 The Duke of  
 WELLINGTON.

And for these reasons, without referring to the other important arguments which were adverted to at the hearing, I am of opinion, that this demurrer must be allowed.

Demurrer allowed.

June 11, 12.  
 July 24, 28.  
 Nov. 5.

*In re* CURRIE.

The delivery by a client of a promissory note, held, under the circumstances, to amount to a payment of a bill of costs. The special circumstances under which a paid bill may be taxed are such as exist or take place at the time of payment, or such as appear on the face of the bills themselves. 1st.

Where payment is extorted, and there are improper charges even of a small amount, or 2d. where the charges are so gross as to

**T**HIS was a petition presented by Mr. *Burton* for the taxation of the bills of costs of Messrs. *Currie & Co.* his former solicitors.

On the 6th of *December* 1845, a settlement had been come to between the parties of the following nature. A balance of 533*l.* 2*s.* 11*d.* then appeared to be due from Messrs. *Currie* to Mr. *Burton* on their cash account; and, on the other hand, 585*l.* 9*s.* 5*d.* was due from Mr. *Burton* to Messrs. *Currie* for costs. By arrangement, the Respondents, instead of applying the cash balance in satisfaction of the bills of costs, paid the whole over to Mr. *Burton*, and took his promissory note payable in four months.

In *May* 1846 the petition for taxation was presented.

The other facts are so fully stated in the judgment of the Court, that it is unnecessary to repeat them.

The

evidence fraud and oppression, taxation will be directed after payment.

It is imprudent for a client to pay, and for a solicitor to receive, his bill of costs so closely upon their delivery, that they cannot have been deliberately and carefully perused and examined by the client; but this alone is not sufficient to warrant a taxation after payment.

Petition for taxation dismissed, but, under the circumstances, without costs.

The questions were whether, under the circumstances, the bills ought to be considered as paid, and if they were, whether the circumstances were such, that, notwithstanding payment, they ought to be taxed.

1846.

*In re*  
CURRIE.

Mr. *Kindersley* and Mr. *J. V. Prior*, in support of the petition.

Mr. *Turner* and Mr. *Bacon*, *contra*.

The 6 & 7 *Vict. c. 73.*, *Sayer v. Wagstaff* (a), *Massie v. Drake* (b), and *Horlock v. Smith* (c), were cited.

The MASTER of the ROLLS said, there seemed to be some difficulty, from the particulars of alleged overcharge not being sufficiently specified in the petition; and that it was also difficult to say, that the bill had not, by agreement, been taken in lieu of payment. That the hearing of the petition not having been continuous, it was necessary for him to look carefully to the affidavits before he gave judgment.

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The MASTER of the ROLLS.

Nov. 5.

Mr. *Burton*, the Petitioner, for some years employed Messrs. *Currie* and *Woodgate*, and for a short time Messrs. *Currie*, *Woodgate*, and *Williams*, the Respondents, as his solicitors. They transacted business for him to a very considerable amount, and several bills of costs became due to them. The Petitioner, admitting that the

(a) 5 *Beav.* 415.  
(b) 4 *Beav.* 433.

(c) 2 *Myl. & Cr.* 495.

1846.

  
*In re*  
CURRIE.

the bills, with the exception of three, have now been delivered, prays that they may be all taxed, and that all sums of money received or paid by the Respondents and the Petitioner, on account of each other respectively, may be accounted for, and he asks for other consequential relief.

The Petitioner sets forth several transactions in which the Respondents were employed, and states accounts, which were, from time to time, made out by them and sent to the Petitioner, and that in such accounts the amounts of the bills which the Respondents alleged to be due to them were stated, but that the bills themselves, on which those amounts were claimed, were not delivered till the end of their transactions, when the Respondents received a promissory note, or an acceptance of the Petitioner, for the amount then claimed to be due. The object of the special statements in the petition is, to shew either that the bills were never paid, or that if paid, they were paid under such circumstances as to induce the Court to think, that notwithstanding such payment, the bills ought to be taxed. The petition, as originally presented, alleged, in general terms, that the bills contain great and excessive, undue and improper charges against the Petitioner, in respect of which considerable sums of money ought to be struck out and disallowed; and in the petition, as amended, there are described several charges, which, in their nature and character, are alleged to be improper.

The only affidavit on this part of the case is, that of Mr. *Burton* himself, who says, that he has been informed and believes and is advised, that the bills of costs contain great and excessive, undue and improper charges against him, in respect of which considerable sums of money would be struck out and disallowed by  
the

the Master on taxation, if the bills were referred to him for that purpose. It is remarkable, that the affidavit does not identify the bills of costs which were actually delivered, and that there is no specification of the particular items in the bills, which are comprised within the description of the charges which are complained of in the amended petition.

1846.  
In re  
CURRIE.

Two affidavits have been filed on behalf of the Respondents, and the questions are, first, whether the bills ought, under the circumstances, to be considered as paid bills; — and if they are, whether the circumstances are such, that, notwithstanding payment, they ought to be taxed.

The employment continued for several years, and several cash accounts, including the amounts of different bills of costs, having been delivered, it appears, that, in the autumn of 1845, a settlement was contemplated, and communications on the subject took place between Mr. *Woodgate* and Mr. *Dent*, the partner of Mr. *Burton* the Petitioner, who frequently acted for him in matters pending between him and the Respondents. Mr. *Woodgate* states in his affidavit, to which no answer is made, that it was arranged between him and Mr. *Dent*, that, without fixing any immediate period for the purpose, an early opportunity should be taken for making a settlement of the accounts; and it was stated in conversation, that the balance considered due to the Respondents was estimated as probably amounting to 500*l.* or 600*l.*

In *November* 1845, Mr. *Burton* was under an obligation to pay a large sum of money to Mr. *Lascelles*, who was also a client of the Respondents; and the Petitioner, being under some temporary pressure, hoped to obtain accommodation from the Respondents, or from  
Mr.

1846.

  
*In re*  
CURRIE.

*Mr. Lascelles* through their means. They were unable to give or procure such accommodation, and some dissatisfaction arose on the part of the Petitioner. On the 15th of *November*, it appeared that *Mr. Burton* had occasion for 3000*l.*, and the Respondents, being unable to accommodate him in the manner he desired, or to advance so large a sum themselves, offered to do their utmost to raise the amount for him, and at the same time alluded to the arrangement for settling the account; and as *Mr. Burton* was about to raise money, intimated the propriety of his raising enough to pay their bills, in addition to the amount which he wanted for his other purposes, and to this *Mr. Burton*, through his partner *Mr. Dent*, answered, that 3000*l.* would be enough for his purposes, if the Respondents were satisfied to take his acceptance for their bills of costs to become payable in three months date.

The rest of the negotiation seems to have been principally conducted by *Mr. Dent*, on behalf of *Mr. Burton*. In the end, *Mr. Woodgate* procured from his brother a loan of 3000*l.*, which *Mr. Burton* wanted. After this was done, and on the 6th of *December* 1845, a balance of 533*l.* 2*s.* 11*d.* appeared to be due from the Respondents to *Mr. Burton* on the cash account, and the bills of costs due to the Respondents from *Mr. Burton* appeared to amount to 585*l.* 9*s.* 5*d.*; and, pursuant to the arrangement, the Respondents, instead of applying the balance due from them, or any part of it, towards satisfaction of their bills, paid the whole of it to *Mr. Burton*, and took his promissory note or acceptance, payable in four months, to which they had consented to enlarge the time before proposed for the 585*l.* 9*s.* 5*d.*, the amount of their bills.

Where

Where a bill of exchange or promissory note is given in lieu of payment in money, it is proper to consider, whether the delivery of the bill or note ought to be considered as actual payment. Did the Respondents agree to take it in payment of the debt? The suggestion as to the mode of payment proceeded from the Petitioner: he said that 3000*l.* would be enough for his purposes, provided the Respondents were satisfied to take his acceptance for their bills of costs. The suggestion was repeated in a memorandum on the 22nd of *November* as follows: — “*Mr. Archer Burton* to give *Messrs. Currie & Co.* an acceptance at three months for their bills of costs, on being furnished with all their bills that have not been delivered.” It was afterwards agreed, that the time should be enlarged to four months, and should run from the delivery of the bills, and *Mr. Burton* having, when he sent the acceptance, stated, that he returned the bill accepted, “subject to such revision of the account as he might feel necessary,” *Mr. Williams* observed upon this to *Mr. Dent*, that he concluded that *Mr. Burton* referred to the cash account, in which there were several sums stated to be retained to answer specific payments, the amount of which could not be immediately ascertained with accuracy, and that he considered, that, as far as related to the bills of costs, the promissory note, signed by *Mr. Burton*, was to be treated as payment; and it is sworn by *Mr. Williams* and not denied, that *Mr. Dent* then stated, that he understood the note to be given in compliance with the terms of the memorandum of the 22nd of *November*, and in lieu of payment thereof in cash, as originally proposed; and it was upon this answer, that the cheque was given to *Mr. Burton* for the 533*l.* 2*s.* 11*d.*, the amount of the cash balance due to him from the Respondents. *Mr. Woodgate* has also expressly sworn, and it is not denied, that, before the note fell due, and  
before

1846.

  
*In re*  
CURRIE.

1846.

*In re*  
CURRIE.

before any intimation was given that the Petitioner desired to have the bills taxed, Mr. *Woodgate* sent and delivered to him, unconditionally, all the deeds, documents, and papers which he believed the Petitioner to be entitled to receive. These circumstances being expressly sworn, and no answer to them given, I think myself bound to give credit to the statement, and to conclude, that the delivery of the bill or note for the amount of the bills of costs was meant and agreed to be a payment or in lieu of payment.

Now a paid bill may be taxed, if the special circumstances of the case shall, in the opinion of the Court, appear to require it. The special circumstances are, as I conceive, such as exist or take place at the time of payment, or such as appear on the face of the bills themselves. Payment may be so extorted (*a*), as to induce the Court to say, that the bill containing improper charges even to a small amount (*b*), shall not be protected from taxation; and the bill may contain charges so gross, that the insertion of them in the bill is, of itself, evidence of fraud and oppression, from which the client will be relieved.

What, then, were the circumstances under which the payment in this case was made? Mr. *Burton* was under some difficulties, arising from his prior engagements with other persons; but there was no pressure upon him moving from the Respondents, and no pressure from others of which the Respondents took or attempted to take any advantage. They had expressed a wish to have their accounts settled and their bills paid; but there was no urgency on the subject, no pressure, and no influence

(*a*) *In re Tryon*, 7 Beavan, 467.; *In re Jones*, 8 Beavan, 496.; *In re Wells*, 8 Beavan, 479.  
416.; *In re Bennett*, 8 Beavan, 416. (*b*) *In re Wells*, 8 Beavan, 416.

fluence used to obtain payment. There was, indeed, this, which I hope is extraordinary, and which I cannot think prudent on the part of either solicitor or client,—the bills were paid as soon as delivered and before they had been examined. The time seems to have been such, that the Respondents must have known that the bills could not have been carefully examined; nevertheless, it is sworn, and not denied, that Mr. *Burton* might have perused and investigated the bills, at the time of the delivery thereof, and that prior to the giving of his promissory note for the amount thereof he had the opportunity; and though I must think it imprudent for the client to pay, and perhaps still more so for the solicitor to receive payment of bills of costs, so closely upon their delivery that they cannot have been deliberately and carefully perused or examined by the client, I cannot say, that it may not be legally done, or that payment, under such circumstances, cannot be legally valid. I do not think, that, in the absence of any thing like fraud, circumvention or oppression, acceptance of payment, under such circumstances, is to be deemed such a special circumstance, as, of itself, or together with some possible but unascertained overcharge, to entitle the client to taxation after payment.

It only remains to consider the alleged overcharges. If overcharges are not alleged and proved to such an extent as to amount to fraud, they are not of themselves to be considered as ground for taxing bills of costs after payment. This was laid down by Lord *Eldon*, and strongly confirmed by the present Lord Chancellor. It is not enough to shew that the bills contain some items which might have been disallowed on taxation.

The original petition and the affidavit filed in support of it, contained a general allegation of improper charges, without specifying any in particular.

VOL. IX.

R r

The

1846.

*In re*  
CURRIE.



1846.

*In re*  
CURRIE.

The amendments introduced into the petition are not supported by any affidavit; the bills to which they refer are not proved to have been the bills delivered; and the principal complaint is, of charges of certain descriptions, without specifying the particular items in the bills to which the complaint refers. I believe, indeed, from the way in which the petition has been met by the Respondents, that the charges referred to in the amended petition are charges which have been, on some occasion or occasions, made in the bills delivered; but I do not think that they are so alleged, as to enable the Respondents to give such explanations, or make such defence, as the circumstances of the case might have admitted, or so alleged and proved as to entitle the Petitioner to tax these bills. (a)

The two items of 27*l.* 13*s.* 6*d.* and 14*l.* 1*s.* 2*d.*, which are specifically complained of, and which amount together to 41*l.* 14*s.* 8*d.*, are, I think, sufficiently explained in the affidavit of Mr. *Woodgate*.

And the petition, failing in its object, must be dismissed.

I have felt some hesitation upon the subject of costs; but, considering the mode in which the Respondents claimed credit, in account, for bills not delivered, and the circumstances under which the bills were paid; and having also regard to the facts appearing in the answer which the Respondents have given to some of those charges in the petition, which I do not think sufficiently alleged and proved to entitle the Petitioner to relief; it appears to me, on the whole, that the petition should be dismissed without costs.

I think

(a) *In re Thompson*, 8 *Beavan*, 237.

I think that, without any order being made for the purpose, the two bills, one for 4*l.* 10*s.* 3*d.*, and the other for 14*l.* 4*s.* 6*d.*, which Mr. *Woodgate* states were not delivered through inadvertence, ought to be now handed over to the Petitioner.

1846.

*In re*  
CURRIE.

GLAZBROOK *v.* GILLATT.

Nov. 24.

**T**HIS petition, for a stop order (*a*), was served not only on the Assignor, but on the other parties to the cause.

Mr. *Prior* for the Petitioner.

Mr. *Cayley Shadwell* for the Assignor.

Mr. *Beavan*, for the other parties to the cause, asked for their costs, on the ground that, under the general order of the 3rd *April* 1841 (*b*), which directs, "that henceforward any person presenting a petition for any such order as aforesaid, shall not be required to serve such petition upon the parties to the cause, or upon the persons interested in parts of the stocks or funds not sought to be affected by any such order," it was unnecessary to serve them.

A petition for a stop order was served not only on the assignor, but on the other parties to the cause. The Petitioner was ordered to pay the costs of the latter.

*The MASTER of the ROLLS*, concurring in the argument, ordered the costs to be paid by the Petitioner.

(*a*) *Ante*, p. 492.

(*b*) *Ordines Can.* 161.



AN  
INDEX  
TO  
THE PRINCIPAL MATTERS.

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ABATEMENT.

1. Re-delivery of documents deposited in the Master's office ordered, on petition, in an abated suit. *Alderman v. Bannister.*

Page 516

2. In an abated suit, the Master has no jurisdiction, under the 60th Order of 1828, to direct the re-delivery of papers deposited in his office. *Ibid.*

ABSOLUTE INTEREST.

1. Bequest of 2000*l.* to *A.*, and in the event of her death without children, to her heirs, the nearest relations of her grand aunt *A.* Held, that *A.* took an absolute interest. *Yearwood v. Yearwood.*

276

2. A testator bequeathed his residue to his three sons, in trust, to be divided between his three sons and his daughter, and he directed his daughter's share to be kept in the hands of his sons, for

her "or" her children's sole use, free from the controul of her husband. The daughter survived. Held, that she took absolutely. *Whitcher v. Penley.* Page 477

3. A testator gave fourteen Phoenix shares on trust, to pay the produce of ten to his daughters for life, and afterwards to his son, and afterwards to the son's "children;" and he gave the other four shares to his son for life, and afterwards to his "children;" and, in default of "such issue" of his son, he gave all the shares to his "daughters" and their "issue," share and share alike, such issue not to be entitled to or take more than their deceased parent's share. The son died without issue. Held, that the daughters took absolute interests, and that their children took only by way of substitution for their parents, and not by way of limitation or succession. *Hedges v. Harpur.* 479

## ACCOUNT.

1. A builder entered into a contract to build an union workhouse on certain specified terms, but became bankrupt before it was completed, and it was finished by the guardians. A bill by the assignees to have an account taken of what had been done, was dismissed with costs, on the ground that it was not a proper subject for a suit in equity. *Ambrose v. Dunmow Union*.

Page 508

2. Under a decree to take an account of the testator's debts, and to compute interest on such of his debts as carried interest, the Master has not jurisdiction to allow a compensation to a party for unliquidated damages on a breach of covenant; but, upon an application to the Court, proper directions will be given for the investigation of such a claim. *Cox v. King*.

530

See INTERROGATORIES, 2.

PRINCIPAL AND AGENT.

## ACQUIESCENCE.

See LACHES.

MASTER'S REPORT.

## ADMINISTRATION SUIT.

See ACCOUNT, 2.

## ADULTERINE BASTARDY.

1. Observations as to the nature and extent of proof necessary to establish a case of adulterine bastardy, and as to what kind of evidence is admissible in such cases.

*Hargrave v. Hargrave*. 552

2. A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law, is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by shewing that the husband was, 1st. Incompetent. 2. Entirely absent, so as to have no intercourse or communication of any kind with the mother. 3. Entirely absent at the period during which the child must, in the course of nature, have been begotten. 4. Only present under circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question and establishes the illegitimacy of the child of a married woman. *Hargrave v. Hargrave*.

Page 552

3. It is, however, very difficult to conclude against the legitimacy, in cases where there is no disability and where some society or communication is continued between husband and wife during the time in question, so as to have afforded opportunities of sexual intercourse; and in cases where such opportunities have occurred, and in which any one of two or more men may have been the father, whatever probabilities may exist, no evidence can be admitted to shew that any man, other than the husband, may have been, or probably was, the father of the wife's child. Throughout the investigation

vestigation the presumption in favour of the legitimacy is to have its weight and influence, and the evidence against it ought to be strong, distinct, satisfactory, and conclusive. *Hargrave v. Hargrave.* Page 552

# AFFIDAVITS.

1. On a motion for an issue to try the Plaintiff's heirship, affidavits of facts of which the Defendant by his answer professes to be ignorant are inadmissible. *Lancashire v. Lancashire.* 259
2. Practice as to swearing affidavits, upon the Masters' ceasing to attend at the public office. *Order of November 1847.* xvii

# AGENT.

See FACTOR.

# AMENDING. .

Upon the allowance of a demurrer the question of costs and liberty to amend are in the discretion of the Court, and for the purpose of determining them, the Court to some extent has regard to the statements in the bill, though admitted only for the purposes of the demurrer. *Schneider v. Lizardi.* 461

# AMENDMENT.

1. A special order to amend, without prejudice to an injunction, must be made to the Court and not to the Master. *Wright v. King.* 161
2. An order of course to amend by

adding parties, obtained after replication, is irregular. *Hitchcock v. Jaques* Page 192

3. A Plaintiff, having one of the Defendants under his control, kept back his answer. Another Defendant put in his answer, and after great delay, on the part of the Plaintiff, moved to dismiss for want of prosecution. The Plaintiff to defeat the motion, obtained an order, of course, to amend. Held that, as there was an answer outstanding, the order to amend could not be considered "irregular." But it was afterwards discharged on other grounds. *Forman v. Gray.* 196
4. An order of course, though obtained within the time limited by the General Orders, discharged, on the ground of the inexcusable delay of the Plaintiff, in proceeding and getting in the answer of a Defendant under her control, and because it had been obtained for the purpose of defeating a motion to dismiss for want of prosecution. *Ibid.* 200
5. The expressions "last answer" and "the last of several answers" in the General Orders regulating the period within which a Plaintiff may obtain an order of course to amend, mean the last answer required in the then state of the record. *Ibid.*
6. On a motion to discharge an order of course to amend, in a cause attached to another branch of the Court, the Master of the Rolls has not jurisdiction to take into his  
R r 4 consideration

consideration, the conduct of the parties, and will only determine, whether the order has been regularly obtained. *Arnold v. Arnold*.

Page 206

7. A Plaintiff is not to obtain an order of course to amend, after service of notice to dismiss for want of prosecution. *Order of 13th April 1847.* xiii

See DECREE, 3.

DISMISSAL FOR WANT OF PROSECUTION, 1.

GENERAL ORDERS, 4.

ORDER OF COURSE, 1, 2.

#### ANNUITY.

A testator gave to each of his five daughters 400*l.* per annum, for their lives; and after their respective deceases, he gave the same to their children respectively; and in case any of the daughters died without issue, the annuity to cease. Held, that the children of the daughters took for life only a proportion of the annuity. *Hedges v. Harpur*. 479

#### ANSWER.

1. As to the necessity of infants and the Attorney General raising the points of their defence specifically, by the answer, instead of putting in what is termed the common answer. *Lane v. Hardwicke*. 148
2. Proceedings of contempt for want of answer stayed, on proof of the Defendant's inability, by reason of illness, to put in his answer. *Hicks v. Lord Alvanley*. 163

3. Where a bill was amended before answer, an answer expressed to be "to the bill of complaint &c.," is regular, but where the amendments take place after answer, the subsequent answers should be headed, "to the amended bill of complaint." *Rigby v. Rigby*.

Page 311

See EVIDENCE, 4.

#### APPEAL.

See STAYING PROCEEDINGS PENDING APPEAL.

#### APPEARANCE.

See SOLICITOR AND CLIENT, 7.

#### APPROPRIATION OF PAYMENTS.

*A. B.*, a married woman, conveyed her separate estate to *C. D.*, in trust to sell &c., and pay a debt due to him from her, and further advances, not exceeding in the whole 400*l.*, and to hold the surplus for her separate use. *C. D.* afterwards made further advances far exceeding the limit, part of which was paid upon bills drawn on him by *A. B.* with directions "to charge the same to the account of" her separate estate. Held, that *C. D.* was not entitled to appropriate his receipts, in the first place, in payment of the advances not covered by the security, the Court considering that *C. D.*'s receipts could not be considered as indefinite payments; that

that he had them only for the purpose of paying off the charge, and afterwards for *A. B.*'s separate use; and that, upon the true construction of the instruments, *C. D.* was bound to apply the separate estate which he received, in satisfaction of the charge, and could only consider the surplus, after such satisfaction, as subject to the disposition of *C. D.*, or liable to such ordinary lien as he might acquire by advancing money to her. *Smith v. Smith.* Page 80

#### ARBITRATION.

Upon the face of an award, the arbitrator appeared to have improperly disallowed a sum of 818*l.* On an application to a Court of Equity to set aside the award, the Respondent offered to allow it. Held, nevertheless, that the award must be set aside. *Skipworth v. Skipworth.* 135

#### ASSIGNMENT.

*See* DEED POLL.  
EXPECTANCY.

#### ATTORNEY GENERAL.

*See* ANSWER, 1.

#### AWARD.

*See* ARBITRATION.

#### BANKRUPTCY.

1. *A.* authorised the sale of his share in a brewery to *B.*, his surviving partner, whom he appointed one of his executors. *B.* conceiving he had duly become the purchaser, carried on the business until his death, and it was subsequently carried on by *C.* his executor. Afterwards, upon a bill filed, the sale was set aside, and the estate of *A.* became entitled to share in the profits made subsequent to *A.*'s death. *C.* afterwards became bankrupt, having the whole trade property in his possession. Held, that the property was not within the order and disposition of the bankrupt. *Stocken v. Dawson.* Page 239
2. Form of reference under the 7 & 8 *Vict. c. 111.*, in the case of a bankrupt joint stock company. *In re The Forth Marine Insurance Company.* 469

*See* LIEN.

#### BARON AND FEME.

*See* HUSBAND AND WIFE, 1, 2.  
PIN MONEY.

#### BILL.

A bill containing reflections on a party, ordered, by consent, to be taken off the file. *Clifton v. Bentall.* 105

BILL



## BILL OF COSTS.

See SOLICITOR AND CLIENT, 9.

## BILL OF REVIEW.

See DEMURRER, 5, 6.

## BREACH OF TRUST.

1. Where trustees for sale sell the trust property, and place the conveyance, executed by them, and having their receipt endorsed, in the hands of a solicitor, who receives and misapplies the purchase-money, they are liable for a breach of trust. *Ghost v. Waller*.

Page 497

2. In a suit by children against trustees, to make them liable for a breach of trust, it was alleged by the trustees, that their co-Defendant, the tenant for life, had concurred; the decree was made against the trustees, without prejudice to any right or remedy they might have against the tenant for life. *Meyer v. Montriou*. 521

See COSTS, 5.

INDEMNITY.

INTERROGATORIES, 1, 2.

MUNICIPAL CORPORATION, 1.

## CASES AND OPINIONS.

See PRODUCTION OF DOCUMENTS, 3.

## CASES COMMENTED ON.

1. The decision in *Selwood v. Mildmay* (3 Ves. 306.) explained, and the effect of the decree therein stated. *Lindgren v. Lindgren*.

Page 358

2. The case of *Selwood v. Mildmay* is not overruled by the cases of *Miller v. Travers* (8 Bing. 244.), and *Doe dem. Hiscocks v. Hiscocks* (5 M. & W. 363.). *Ibid*.

## CHARGE ON REAL ESTATE.

A testator gave legacies, and charged his executors, to whom he devised real and personal estate, with the payment thereof. Held, that the legacies were charged on the real estate. *Cross v. Kennington*. 150

## CHARITY.

See MORTMAIN, 1, 2.  
TRUST.

## CHILDREN.

See ABSOLUTE INTEREST, 2.  
ISSUE, 4, 5,

## CLASS.

See NEXT OF KIN, 1, 2, 3.

## CLERKS OF COUNSEL.

1. Fees to counsels' clerks are mere gratuities, for which they have no legal demand, and this Court has no jurisdiction in respect of such fees

fees as against the clerks. *Ex parte Cotton*. Page 107

2. The sum allowed for clerks' fees on taxation does not limit the sum which may be spontaneously given, but it does limit the sum which the solicitor can safely pay without the special direction or permission of the client. *Ibid.*

See GENERAL ORDERS, 1.

#### CO-DEFENDANT.

See EVIDENCE, 4.

#### COMPROMISE.

See CREDITOR'S SUIT, 2.

#### CONDITION.

A testator having an estate subject to a mortgage of 4460*l.* created by himself, devised it to *A. B.* in fee, "he paying the mortgage thereon;" and he devised his residuary real and personal estates to trustees for the payment of his debts, and he gave to the mortgagee, through the medium of his executors, 2000*l.* to exonerate the estate. Held that, although, if the devise had been simply "of the estate" or "of the estate subject to the mortgage thereon," the mortgage would have been payable out of the testator's general estate, yet that the words "he paying the mortgage thereon," imposed a duty on the devisee, and amounted to a direction or condition that he should pay the mortgage, or take the estate sub-

ject to the burden upon it, so far as the same exceeded the 2000*l.* *Lockhart v. Hardy*. Page 379

#### CONSIDERATION.

See HUSBAND AND WIFE, 1, 2.

#### CONSTRUCTION.

See DEED.

SETTLEMENT.

#### CONTEMPT.

See ANSWER, 2.

GENERAL ORDERS, 2.

#### CONTRACT.

See LUNATIC, 2.

VENDOR AND PURCHASER.

#### CONVEYANCE.

See DECREE, 1.

STATUTE, 1.

VENDOR AND PURCHASER, 1.

#### COPY BILL.

Whether the Court can order substituted service of a copy bill under the 23rd Order of August 1841, *quære*. *Thomas v. Selby*. 194

#### COSTS.

1. Where a Plaintiff imputes personal fraud which is not proved, it is a reason for awarding costs against him on a dismissal of his bill. *Langley v. Fisher*. 90
2. An order for rehearing was discharged with costs, but in the meantime the cause had been set down and briefs delivered. Held, that

- that the costs thereof could not be included in the order, and could only be given on a rehearing or upon special application. *Davenport v. Stafford*. Page 106
3. Petition against a clerk of counsel dismissed for want of jurisdiction, but without costs, on account of his improper conduct in the matter complained of. *Ex parte Cotton*. 107
4. A petition to review a taxation was successful, but the petitioner, not having taken proper steps to satisfy the Taxing Master, when the matter was in his office was ordered to pay the costs. *Sturge v. Dimsdale*. 170
5. The representative of a defaulting executor, fairly accounting, is entitled to deduct his costs of suit out of the assets, though they may be insufficient to repair the breach of trust. *Haldenby v. Spofforth*. 195
6. An executor was allowed, under the circumstances, the costs of a cross cause for administration of the estate instituted by him against his *cestui que trust*. *Nelson v. Duncombe*. *Duncombe v. Nelson*. 211
7. Whether it is regular to present a petition to come on with the cause on further directions, for the purpose of stating circumstances occurring since the filing of the bill, with a view only to the adjudication of the costs of suit. *Semble not*. *Tanner v. Dancey*. 339
8. Where the fund is deficient, the executors' costs of an administration suit are paid thereout in priority of those of the other parties. *Tanner v. Dancey*. Page 339
9. Where a bill for specific performance is filed by a purchaser, and it turns out that the vendor cannot make a good title, the bill is dismissed, but without costs. *Malden v. Fyson*. 347
10. A bill contained allegations of great fraud against trustees which all failed. The trustees were removed, but not, however, on the ground of misconduct. Held that they were entitled to the costs of the whole suit. *Passingham v. Sherborn*. 424
11. Upon the allowance of a demurrer, the question of costs and liberty to amend are in the discretion of the Court; and for the purpose of determining them, the Court, to some extent, has regard to the statements in the bill, though admitted only for the purposes of the demurrer. *Schneider v. Lizardi*. 461
- See* DISCLAIMER.
- DISMISSAL FOR WANT OF PROSECUTION, 1, 2.
- INTEREST, 4.
- ORDER OF COURSE, 3.
- RECEIVER, 1.
- SOLICITOR AND CLIENT, 6. 8. 12.
- STOP ORDER, 3.
- TAXATION, 6, 7. 14. 20.
- COUNSEL.
- See* TAXATION, 6, 7.

CREDITOR'S

CREDITOR'S SUIT.

1. A party who comes in in a creditor's suit, intrusting the management of the suit to the Plaintiff, must, upon an application to review the proceeding, stand in the place of the Plaintiff, and in the absence of fraud, be bound by his knowledge. *Gwynne v. Edwards.* Page 22
2. A creditor's bill was filed by A., on behalf of himself and other creditors, against B. and others. After decree the suit abated by the death of B. C., his executor, filed a bill of revivor on behalf, &c., and the suit was revived. A. afterwards filed other bills, and the proceedings before the Master were attended by A. on behalf of the creditors at large. Held, that C. was not, by the fact of filing the bill of revivor on behalf, &c., incapacitated from compromising for his own benefit a claim on the estate. *Armstrong v. Storer.* 277  
See LACHES.

CROSS CAUSE.

See EVIDENCE, 3.

DAMAGES.

See ACCOUNT, 2.

DECREE.

1. A secret purchase by an agent from his principal was set aside. By the decree, possession was

directed to be given, and a conveyance to be executed. Accounts were also directed to be taken of the rents and purchase-money, and the balance was directed to be paid, but no lien was given. Held, that the conveyance must at once be made, without waiting for the result of the accounts. *Trevelyan v. Charter.*

Page 140

2. In a case in which the defence of an infant had not been properly raised and proved, a decree was made for the Plaintiff, without prejudice to any bill to be filed by the infant within six months to establish his right. *Lane v. Hardwicke.* 148
3. An accidental slip in a decree directing a sale, if certain persons "and the heir-at-law" should be found parties, corrected, on petition, by substituting the words "other than the heir-at-law." *Turner v. Hodgson.* 265  
See ACCOUNT, 2.  
PETITION, 1.

DEED.

1. Upon the construction of the particular instruments, held, that, by the conveyance of one fourth "of and in the leat or watercourse," the purchaser acquired no interest in the water, other than such part as remained after supplying the public purposes for which the leat was authorised to be made. *Attorney-General v. The Corporation of Plymouth.* 67
2. Upon

2. Upon a separation between *A.* and *B.* (husband and wife), a deed was executed, making a provision for the wife, and all and every the children of *A.*, by *B.*, who should attain twenty-one. A reconciliation took place, and another child was born. Held, upon the construction of the deed, that such last mentioned child did not participate in the provision. *Hulme v. Chitty.* Page 437

See DEED POLL.  
EQUALITY.  
STATUTE, 2.

#### DEED OF SEPARATION.

See HUSBAND AND WIFE, 1, 2.

#### DEED POLL.

- A deed poll in the form of a power of attorney, held, in equity, to amount to an assignment, or to a covenant to assign. *Bennett v. Cooper.* 252

#### DEMURRER.

1. Upon overruling a demurrer, liberty was reserved to the Defendant, to raise the same objection at the hearing. *Jones v. Skipworth.* 237
2. A Plaintiff having a demand against a firm of *Francisco Lizardi & Co.*, filed a bill against *Helena Lizardi*, alleging that the firm was "represented by her." A demurrer was allowed. *Schneider v. Lizardi.* 461
3. A demurrer allowed to a bill filed by the agent duly authorised, and minister plenipotentiary of a foreign state, in respect of rights of such state, on the ground that the state was not properly represented. *Schneider v. Lizardi.* Page 461
4. The allowance of a general demurrer puts an end to an injunction in the cause, though liberty be given to amend. *Ibid.* 468
5. A demurrer allowed to a bill, filed without leave, for relief, inconsistent with the relief obtained by the same Plaintiff in a former suit. *Bainbrigge v. Baddeley.* 538
6. In 1846, the Plaintiff, claiming an estate under a will of 1815, filed his bill to impeach a subsequent will of 1818, which displaced his title, but had ever since been acted on. It appeared, on the face of the bill, that, on the testator's death, the heir, who was the Plaintiff's father, disputed the will of 1818; but he afterwards, in 1820, confirmed it, and purchased a part of the property from the trustees claiming under it. The heir afterwards sold the benefit of the contract to the Plaintiff, who obtained possession before the completion of the contract; and the trustees having commenced an action of ejectment against him, the Plaintiff filed his bill against the trustees, and the parties claiming beneficially under the will of 1818, contesting the will, and praying that its validity might be ascertained, and, if valid, then that the contract might be specifically performed

- formed. At the hearing, in 1833, so much of the bill as questioned the validity of the will was dismissed with costs; and the bill was also dismissed as against all the parties except the trustees; and a specific performance was decreed. No objection being taken, the Master reported in favour of the title, and the report was confirmed. Held, that the decree in the first suit, being inconsistent with the relief prayed by the present bill, it ought not to have been filed without the leave of the Court; and a general demurrer was allowed. *Bainbrigge v. Baddeley*. Page 538
7. Upon general demurrer, the Court considering there was a fair point for decision at the hearing of the cause, overruled the demurrer, leaving the point open at the hearing. *Norman v. Stiby*. 560
8. In 1805, *A. B.* purchased an estate with the money of *C. D.*, and executed a mortgage to secure the amount. *A. B.* was evicted, and he died in 1812, *C. D.* died in 1816. The same individuals represented both *A. B.* and *C. D.*, and in 1845, they established under the covenant for title a claim against the vendor's estate, for the amount of the purchase-money. The residuary legatees of *C. D.* filed a bill in 1846, against the representatives to recover the amount; the Court thought, that there was so much probability, at least, of their ultimately establishing their equity, that it overruled a demur-

rer to the bill, leaving the question open at the hearing. *Norman v. Stiby*. Page 560

See AMENDING.

COSTS, 11.

DISCOVERY, 3.

HUSBAND AND WIFE, 2.

PLEADING, 1, 2.

PROBATE.

### DISCLAIMER.

In a suit by a second mortgagee, to foreclose and redeem, certain Defendants, including the provisional assignee of the insolvent mortgagor, disclaimed. They were, however, brought to a hearing, and it then appearing that there was insufficient to pay the first mortgage, the Plaintiff declined taking the account. The bill was dismissed as against the disclaiming Defendants, *without* costs, and the first mortgagee alone was held entitled to his costs. *Gibson v. Nicol*. 403

### DISCOVERY.

1. A solicitor is not bound to disclose professional communications, which took place between himself and his client, although no litigation existed or was contemplated at the time. *Carpmael v. Powis*. 16
2. The same rule applies to similar communications between the solicitor and a third party, who acts as the medium of communication between

between the solicitor and client.

*Carpmael v. Powis.* Page 16

3. A solicitor demurred to interrogatories seeking a discovery of communications between him and *A. B.*, stating, that in such communication "he considered and treated *A. B.*, as representing his client, and as being the medium of communication between him and his client." Held, that he had brought the case within the rule as to protection. *Carpmael v. Powis.* 16

#### DISMISSAL FOR WANT OF PROSECUTION.

1. Under the Orders of *May 1845*, in a case where there are several Defendants, any one of them may move to dismiss for want of prosecution at the expiration of four weeks after his answer is sufficient, if the Plaintiff has since taken no step, and that, although his co-defendants may not have put in their answer; but an order to amend, obtained and served after the notice of motion and before its hearing, is, under ordinary circumstances, an answer to the motion to dismiss, but the Plaintiff having, by such means, intercepted the Defendant's right, must pay the costs of the motion. *Lester v. Archdale.* 156
2. On a motion to dismiss for want of prosecution, the Plaintiff undertook to file a replication. The case stood over to enable him to perform his undertaking, and having so done he was ordered to pay the costs of the motion. *Young v. Quincey.* Page 160
3. A Plaintiff having one of the Defendants under his control, kept back his answer. Another Defendant put in his answer, and after great delay on the part of the Plaintiff, moved to dismiss for want of prosecution. The Plaintiff to defeat the motion, obtained an order, of course, to amend. Held, that as there was an answer outstanding, the order to amend could not be considered "irregular," but it was afterwards discharged on other grounds. *Forman v. Gray.* 196
4. Under the General Orders, any Defendant is entitled to move to dismiss for want of prosecution, after the expiration of six weeks from the time when his answer is to be deemed sufficient. Upon such a motion all unavoidable, and all just and reasonable causes of delay may be considered, and in the cautious exercise of its discretion, the Court may grant or refuse to grant any further time the Plaintiff may require. *Ibid.* 200
5. An order of course, though obtained within the time limited by the General Orders, discharged, on the ground of the inexcusable delay of the Plaintiff, in proceeding and getting in the answer of a Defendant under her control, and because it had been obtained for the purpose of defeating a motion to

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*Forman v. Gray.* Page 200

6. On a motion by one of several Defendants to dismiss for want of prosecution, it is not sufficient for the Plaintiff to shew that the answers of other Defendants have not been filed; he must also shew that due diligence has been used in getting them in. Plaintiff, having failed in so doing, was ordered to pay the costs of the motion, and file a replication within a fortnight, and, in default the bill was ordered to be dismissed with costs. *Earl Mornington v. Smith.* 251

#### DOCUMENTS.

See ABATEMENT, 1, 2.

#### EQUALITY.

This Court, when it can consistently with the instrument executed by the parties, will do that which is the highest equity, make an equality between parties who stand in the same relation, but it cannot do that contrary to the plain meaning of a deed. *Hulme v. Chitty.*

437

#### EQUITY.

See EQUALITY.

#### EVIDENCE.

1. In 1843, a testatrix made several bequests to the amount of 1000*l.* " of the stock 3 per cent. consols Vol. IX.

then standing in her name in the books of the Bank of *England.*"

The testatrix died in the same year, and had not at the date of the will, or at her death any stock whatever standing in the Bank books. It appeared, however, from extrinsic evidence that in 1840 she had had a sum of 1000*l.* Bank annuities standing in her name which she sold out and lent to *A. B.* he paying her, down to her death, a sum equal to the dividends. It was held that extrinsic evidence was admissible to prove how the mistake in description arose, and that the legatees were entitled to a sum equal to the value of 1000*l.* consols at her death. *Lindgren v. Lindgren.*

Page 358

2. The Master enlarged publication, and on that occasion, evidence was produced, that the Defendant had not seen the depositions. Immediately afterwards, an application was made for an additional commission, which the Master granted without any further evidence that the Defendant had not seen the depositions. Held, that it was not necessary to bring forward further proof, the Master having already in his office evidence of the fact, and the Court refused with costs an application to set aside the proceedings. *Clark v. Chuck.* 414

3. A cause and cross-cause were attached to the Vice-Chancellor's Court. After publication had passed in the original cause, but  
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*Carpmael v. Powis.* Page 16

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3. A cause and cross-cause were attached to the Vice-Chancellor's Court. After publication had passed in the original cause, but  
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before it had passed in the cross-cause, a Defendant obtained an order of course, at the Rolls, for liberty to use the original depositions "taken" in the cross-cause. Held, that it had not been irregularly obtained. *Sowdon v. Marriott*. Page 416

4. The answer of a Co-defendant cannot be received in evidence on an inquiry before the Master. *Meyer v. Montrieu*. 521

See AFFIDAVITS.

#### EXCEPTIONS.

1. In a transition case under the Orders of 1845, exceptions were filed one day too late; the Court declined to order them to be taken off the file. *Whitmore v. Sloane*. 1
2. Exceptions for insufficiency were referred by the Plaintiff to the Master in rotation, instead of to the Master to whom there had been a previous reference. Pending the discussion on the irregularity in the Master's office, the time limited for obtaining the report expired. The Court, considering the error to have arisen from inadvertence, and not from wilfulness or perverseness, gave directions to the Master to hear the exceptions. *Tuck v. Raymond*. 38
3. An order for leave to file exceptions in the form of *nunc pro tunc* will not now be made, even by consent, but a special order may be made for filing them, notwith-

standing the time limited has expired. *Biddulph v. Lord Camoys*. Page 155

4. A reference of exceptions made *instanter* in an injunction case, and upon an *ex parte* motion. It is not an order of course, but a special case of prejudice must be made out by affidavit. *Muggeridge v. Sloman*. 314
5. A reference *instanter* of exceptions in an injunction case upon an *ex parte* motion is regular, notwithstanding the 16th General Order of May 1845. Art. 25. *Teesdale v. Swindell*. 491

#### EXECUTOR.

The representative of a defaulting executor, fairly accounting, is entitled to deduct his costs of suit out of the assets, though they may be insufficient to repair the breach of trust. *Haldenby v. Spofforth*. 195

See COSTS, 6. 8.

INTERROGATORIES.

PLEADING, 1, 2.

#### EXPECTANCY.

Effect given to an equitable charge, for valuable consideration, upon expectant legacies. *Bennett v. Cooper*. 252

#### EXPEDITION MONEY.

See TAXATION, 11.

#### EXTRINSIC EVIDENCE.

See EVIDENCE, 1.

#### FACTOR.

FACTOR.

Amongst the most important duties of a factor, are those which require him to give to his principal the free and unbiassed use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of others. A factor having violated all these and other duties, held, that no credit was due to his accounts, and that the principal was not bound by them. *Clarke v. Tipping.* Page 284

See PRINCIPAL AND AGENT.

FEEES.

See CLERKS OF COUNSEL, 1, 2.

FEME COVERT.

See APPROPRIATION OF PAYMENTS.

GUARDIAN, 2.

HUSBAND AND WIFE.

PAYMENT OUT OF COURT.

FINE.

1. Observations as to the legal and equitable right of parties to bar known existing adverse claims by fine and non-claim. *Langley v. Fisher.* 90
2. If, in levying a fine, a direct fraud is practised, this Court has undoubted jurisdiction to give relief; but the mere fact that a party levying a fine has good reason to believe, that if he did not do so, an adverse claim might or would be established against him, has

never been considered as sufficient evidence of a gross fraud, to induce this court to grant relief.

*Langley v. Fisher.* Page 90

3. An estate was settled on husband and wife for life, with a limitation to their issue, and, in default, a power of appointment was given to the wife. There was one child only of the marriage, who died an infant. The wife survived her husband, and appointed the estate to *G. D. F.*, who was the releasee, to uses, and had possession of the settlement. *G. D. F.*, shortly after the wife's death, made a feoffment, and levied a fine with proclamations. After the expiration of the five years, the heir of the child claimed the estate, insisting that, under the terms of the settlement, the child took the estate in fee, and that the power of appointment had never arisen. He filed a bill against *G. D. F.* to avoid the fine, alleging that it had been levied with full knowledge of the Plaintiff's rights, and, with a fraudulent view to bar them. Held, that the act of *G. D. F.* did not constitute a fraud, that *G. D. F.* stood in no fiduciary relation towards the Plaintiff, and the bill was dismissed with costs.

*Ibid.*

FORECLOSURE.

See MORTGAGOR AND MORTGAGEE, 1, 2.

FORMA PAUPERIS.

See PAUPER.

S s 2 FRAUD.

## FRAUD.

See FINE, 1, 2, 3.

PRINCIPAL AND AGENT.

## FURTHER DIRECTIONS.

1. Matters at issue at the first hearing, which are neither decided, put into a train of investigation or reserved, must, on further directions, be regarded either as abandoned or as points on which the Plaintiff was entitled to no order. *Passingham v. Sherborn*. Page 424
2. At the first hearing, liberty was given to the Defendant to bring an action as to a charge. He abstained from so doing. Held, that in the absence of some proper excuse, the charge must be considered as having failed. *Ibid.*

## GENERAL ORDERS.

1. 5th November 1840.  
The regulation of the 5th November 1840 (*Ordines Can.* 157.), is not a general order of the Court, giving the clerks a legal demand for the fees therein mentioned, but a mere intimation of opinion of the equity judges, that they may be properly allowed in taxation. *Ex parte Cotton*. 107
2. 11th Order of August 1841.  
Upon a taxation, not in a cause, a sum was found due to a solicitor from his client. Held, that to compel payment, proceedings

must be had under the old practice, and not under the 11th Order of August 1841. *In re Lovell*.

Page 332

3. 12th Order of August 1841.

The 12th General Order of August 1841 has reference only to orders in a cause, and is inapplicable to the four day order. *Semble. In re Blake and Young*. 209

4. 16th Order of May 1845, art. 14. 38.

The 16th General Order of May 1845, art. 38., has reference to amendments after answer. When the amendments are before answer, the case is governed by the 14th article of the same order. *Rigby v. Rigby*. 311

- 4th Order of April 1828. — See EXCEPTIONS, 1.

- 5th Order of April 1828. — See ORDER OF COURSE, 3.

- 60th Order of April 1828. — See ABATEMENT, 2.

- 15th Order of December 1833. — See ORDER OF COURSE, 3.

- 15th Order of May 1837. — See JURISDICTION, 1.

- 6th Order of May 1839. — See AMENDMENT, 6.

- 23rd Order of August 1841. — See COPY BILL.

- PARTIES, 2.

- 18th Order of October 1842. — See SOLICITOR AND CLIENT, 3, 4.

- 16th Order of May 1845, art. 22. — See EXCEPTIONS, 1.

- 16th Order of May 1845, art. 25. — See EXCEPTIONS, 4, 5.

- 16th Order of May 1845, art. 33. — See AMENDMENT, 3, 5.

See

*See* DISMISSAL FOR WANT OF PROSECUTION, 4, 5.

17th Order of *May* 1845.— *See* EXCEPTIONS, 3.

32nd Order of *May* 1845.— *See* GUARDIAN, 2.

65th, 66th, and 68th Orders of *May* 1845.— *See* AMENDMENT, 2.

114th Order of *May* 1845.— *See* DISMISSAL FOR WANT OF PROSECUTION, 1.

Order of 13th *April* 1847.— *See* AMENDMENT, 6, 7.

Order of 21st *April* 1847.— *See* MASTER'S OFFICE.

Order of 28th *July* 1847.— *See* MASTERS IN ROTATION.

Order of 9th *August* 1847.— *See* AFFIDAVITS, 2.

#### GUARDIAN.

1. The Court exercises a control in respect of any allowance ordered to be paid to a testamentary guardian, and on the marriage of a female testamentary guardian to whom an allowance for maintenance has been ordered to be made, inquires into the altered state of circumstances. *Jones v. Powell.* Page 345
2. On an application that the solicitor of a feme covert might be appointed, under the 32d Order of 1845, guardian to defend her husband, who was a lunatic, the Court required evidence that the husband and wife had no adverse interests. *Biddulph v. Lord Camoys.* 548
3. The Court refused to appoint the Plaintiff's solicitor guardian of a lunatic Defendant. *Ibid.*

4. In appointing such guardian, the Court will not interfere with his discretion. Page 548

*See* LUNATIC, 1.

#### HEIR.

1. Where the Plaintiff's right depends on his being heir, the Court has jurisdiction to grant an issue to try that fact on an interlocutory motion. If the facts of the case make it proper, it is not very important, whether they appear on a motion for an injunction or receiver, or upon a direct motion for the issue. *Lancashire v. Lancashire.* 259
2. Such an issue was refused, in a case where there was nothing but the bare assertion of the Plaintiff's heirship, on the one side, and the assertion of the Defendant's ignorance on the other. *Ibid.*  
*See* RECEIVER, 3.

#### HUSBAND AND WIFE.

1. Observations on deeds of arrangement between husband and wife. *Jodrell v. Jodrell.* 45
2. A wife having instituted a suit against her husband for a divorce, an arrangement was come to, and the husband executed a deed, by which he assigned a house to trustees, to permit the wife to enjoy it and accommodate herself and children, and an income of 4000*l.* a year was also provided for her separate use to keep up the establishment  
S : 3

blishment for herself and children, "upon such a scale and regulated in such a manner as she should think fit," and the surplus was to be repaid to the husband. The deed provided, that so long as the husband should be desirous to reside in the house "and to conform to the spirit and intention of the deed, and to partake of the benefit of the establishment to be kept up therein by the wife, he should be at liberty so to do." The suit was discontinued, and the husband partook of the establishment. Held, first, that the deed was not void on any ground of public policy; secondly, that, being a family arrangement and a compromise of disputed rights, there was a sufficient consideration; thirdly, that it was not void for uncertainty; fourthly, that the Court could enforce its due performance, both by the wife and the husband, and a demurrer by the husband on those several grounds was therefore over-ruled. *Jodrell v. Jodrell*. Page 45

See ADULTERINE BASTARDY.

DEED, 2.

MARRIAGE SETTLEMENT.

PARTIES, 1.

PIN MONEY.

RECEIVER, 4.

SETTLEMENT.

## IMPLIED CONTRACT.

See LUNATIC, 2.

## INCAPACITY TO CONTRACT.

See VENDOR AND PURCHASER, 2.

## INFANT.

See ANSWER, 1.

DECREE, 2.

STATUTE, 1.

## INDEMNITY.

A marriage being in contemplation, *A. B.* the intended wife, conveyed property to trustees for herself until marriage, and then for her separate use for life without power of anticipation, and subject to certain interests to her husband and children, if any, for herself. Before the marriage took effect, the trustees committed a breach of trust against which *A. B.* by her solicitor, gave an indemnity. The marriage took effect two years after the settlement, and the husband died without children. Held that the indemnity was valid and subsisting, and that the trustees had been released from their liability. *Ghost v. Waller*. Page 497

## INJUNCTION.

The allowance of a demurrer to the whole bill puts an end to an injunction though liberty is given to amend. *Schneider v. Lizardi* 461

See AMENDMENT, 1.

EXCEPTIONS, 4, 5.

SOLICITOR AND CLIENT, 11.

## INSOLVENT

INSOLVENT DEBTORS' ACT.

See STATUTE, 3.

INTEREST.

1. Interest on legacies is given for delay of payment, and consequently, until the day of payment arrives, no interest is, in general, demandable. *Donovan v. Needham.* Page 164
2. When a legacy is given by a parent to his child, interest is allowed thereon, by way of maintenance, though the day of payment has not arrived. But the rule does not apply, where the testator has, by his will, made a provision for the child's maintenance. *Donovan v. Needham.* 164
3. Legacy to *A.*, on condition that she gave 3000*l.* to purchase an annuity for *B.* In consequence of a litigation between *A.* and the residuary legatees, *A.* did not, for several years, obtain possession of the legacy, which did not, in the meanwhile, make interest. Payment to *B.*, who elected to take the 3000*l.* in lieu of the legacy, was consequently postponed. Held that interest on the 3000*l.* was payable by *A.* to *B.* from the end of a year after the testator's death. *The Marquis of Hertford v. Lord Lowther.* 266
4. Interest on a bill of costs while under taxation not allowed. *In re Smith.* 342

INTERROGATORIES.

1. Application for leave to exhibit

interrogatories in the Master's office, for the examination of an executor, the object being to charge him with a breach of trust not raised by the pleadings, refused with costs. *Ford v. Bryant.*

Page 410

2. A bond, given by a testator to his daughter, was assigned by her and her husband to trustees for the daughter and children. The husband and wife subsequently assigned it to *A. B.* to secure a debt. After the testator's death, his executor, without notice, as he alleged, of the first assignment, paid to *A. B.* the amount of the debt. A decree was made for taking the usual accounts of the testator's estate, and the trustees claimed the amount of the bond; but the Master being of opinion that, as the matters stood, the payment of the executor to *A. B.* was good, an application was made to the Court by the wife and children (Defendants in the cause) for liberty to examine the executor as to the fact of notice, but it was refused with costs. *Ford v. Bryant.* 410
3. Under a common decree against an executor to take the accounts, the executor was interrogated as to two specified sums, and he fully answered. A new set of interrogatories were exhibited with a view of throwing discredit on this answer. Held, that the Master was wrong in allowing them. *Suckermore v. Dimes.* 518



## IRREGULARITY.

In a transition case under the Orders of 1845, exceptions were filed one day too late; the Court declined to order them to be taken off the file. *Whitmore v. Sloane*. Page 1

See AMENDMENT, 3, 4, 6.

EXCEPTIONS, 2. 5.

MASTER'S REPORT.

ORDER OF COURSE, 1, 2.

SOLICITOR AND CLIENT, 6.

## ISSUE.

1. An application to stay the trial of an issue, for the purpose of obtaining further evidence, refused with costs, under the circumstances. *Hargrave v. Hargrave*. 153

2. Where the plaintiff's right depends on his being heir, the Court has jurisdiction to grant an issue to try that fact on an interlocutory motion. If the facts of the case make it proper, it is not very important, whether they appear on a motion for an injunction or receiver, or upon a direct motion for the issue. *Lancashire v. Lancashire*. 259

3. Such an issue was refused in a case where there was nothing but the bare assertion of the Plaintiff's heirship, on the one side, and the assertion of the Defendant's ignorance on the other. *Lancashire v. Lancashire*. 259

4. The word "issue" may be restricted so as to mean children, and conversely the word "child-

dren" may, from the context, be enlarged so as to be construed "issue;" each case depends on the peculiar expressions used, and the structure of the sentences. If the case be doubtful, the Court prefers that construction which will most benefit the testator's family, on the supposition that this must more nearly correspond with his intention. *Farrant v. Nichols*. Page 327

5. Though the word "issue" be, in one clause of a will, construed "children," it does not necessarily follow that it will receive the same construction in all the other clauses. *Hedges v. Harpur*. 479

See ABSOLUTE INTEREST, 3.

LIFE INTEREST.

## JOINT STOCK COMPANY.

Form of reference under the 7 & 8 Vict. c. 111., in the case of a bankrupt joint stock company. *In re The Forth Marine Insurance Company*. 469

See NOTICE, 1, 2.

## JUDGMENT.

A judgment was entered up &c., against Mr. *H.* under a warrant of attorney. In the judgment, warrant of attorney &c., he was named *W. H.*, his proper name being *W. B. H.* Held, that the judgment

judgment was valid. *Hotham v. Somerville.* Page 63

See VENDOR AND PURCHASER, 1.

# JURISDICTION.

1. In the vacation, the Vice-Chancellor heard a motion for the Master of the Rolls, which he refused. Held, that no application for the same purpose could afterwards be made to the Master of the Rolls, even if supported on different grounds from those before the Vice-Chancellor. *Man v. Ricketts.* 4
2. The Vice-Chancellor, by permission of the Lord Chancellor, granted an injunction in a cause attached to the Rolls Court. Held, that the Master of the Rolls had no authority to dissolve it. *Paredes v. Lizardi.* 490
3. The absence of a remedy for a supposed wrong, in another place, is not of itself any reason for this Court assuming a jurisdiction on the subject. The case must be such as to bring it properly within the jurisdiction of this Court, on other grounds. *Ryves v. The Duke of Wellington.* 579

See ACCOUNT, 1.

AMENDMENT, 1. 6.

LUNATIC, 3.

ORDER OF COURSE, 3.

PROBATE.

SOLICITOR AND CLIENT, 9.

# KING.

See PROBATE.

# LACHES.

A bill by a creditor, to obtain relief inconsistent with an order in a previous suit, was filed nearly twenty years subsequent to the date of the order, and prayed that the order might be reviewed. An application to rehear the former suit was refused, on the ground of laches, acquiescence, and length of time, but with liberty to renew the application at the hearing of the second suit. *Gwynne v. Edwards.* Page 22

# LEASEHOLD.

See VENDOR AND PURCHASER, 3.

# LEGACY.

An absolute vested bequest was accompanied with a direction, that it should not be delivered till the legatee attained twenty-five. Held, that he was entitled to payment on attaining twenty-one. *Rocke v. Rocke.* 66

See INTEREST, 1, 2, 3.

VESTING.

# LEGACY DUTY.

See TAXATION, 2.

# LEGATEE.

## LEGATEE.

See PLEADING, 1, 2.

## LESSEE.

See TRUSTEE, 3.

## LIEN.

*A.* authorised the sale of his share in a brewery to *B.*, his surviving partner, whom he appointed one of his executors. *B.* conceiving he had duly become the purchaser, carried on the business until his death, and it was subsequently carried on by *C.*, his executor. Afterwards, upon a bill filed, the sale was set aside, and the estate of *A.* became entitled to share in the profits made subsequent to *A.*'s death. *C.* afterwards became bankrupt, having the whole trade property in his possession. Held that the trade creditors during the time the business was carried on by *C.*, had no lien for their debts on *A.*'s share. *Stocken v. Dawson.* Page 239

See APPROPRIATION OF PAYMENTS.  
SOLICITOR AND CLIENT, 5.

## LIFE INTEREST.

A testator bequeathed ten *Pelican* shares to his son, and his heirs, executors, administrators, and assigns for ever, "he paying the profits of eight to the testator's daughters for life; and after their decease, the daughters shares were to "return to his son and his

issue;" and, "in default of such issue," there was a gift over to the "daughters and their issue." Held, that subject to the life interest of the daughters, the son was absolutely entitled to the shares. *Hedges v. Harpur.* Page 479

## LUNATIC.

1. A bill may be filed in the name of a person alleged to be of unsound mind, though not so found by inquisition, by any one professing to be his next friend; and such a person may be sued as a Defendant, and the Court then appoints a guardian to answer for him. In such cases, the Court imposes all the restraints of infancy, and the party is bound by the acts of the guardian so appointed. The Court having proper evidence, that they are incapable of protecting their own interests, treats them as infants or as insane, though not so found by inquisition, and being satisfied that their next friend or guardian pays proper attention to their interests, and making all necessary enquiries to ascertain their rights, and what is beneficial to them; or, if necessary, directing that a commission may be applied for, ultimately deals with their rights and property as justice may require. *Nelson v. Duncombe, Duncombe v. Nelson.* 211

2. A contract may be implied, in favour of a person, who has supplied a person of unsound mind, though not so found by inquisition, with

with necessities, or has provided him with proper protection and support. *Semle. Nelson v. Duncombe, Duncombe v. Nelson.*

Page 211

3. Jurisdiction of the Court to interfere for the protection of a lunatic not found so by inquisition. *Nelson v. Duncombe, Duncombe v. Nelson.* 211

### MAINTENANCE.

*See* GUARDIAN, 1.

### MARRIAGE SETTLEMENT.

1. Whether, after the execution of a marriage settlement, which is not executory, the husband and wife have power before the solemnization of the marriage to revoke it, *quære. Page v. Horne.* 570
2. On the 14th of *March*, in contemplation of a marriage, a mortgage in fee was conveyed to trustees, on certain trusts for the intended wife, husband, and the issue of the intended marriage. On the 27th of *March*, the husband and wife revoked it. Upon a bill by the husband, claiming the mortgage *jure mariti*, the Court referred it to the Master to enquire under what circumstances the revocation had been executed. *Page v. Horne.* 570

### MASTER.

*See* EXCEPTIONS, 2.

### MASTERS IN ROTATION.

*Rota* of Masters how to be ascertained. *Order of 28th July, 1847.*

Page xv

### MASTER'S OFFICE.

Distribution, amongst the other Masters, of the business standing referred to Master *Lynch* at the time of his resignation. *Order of 21st April, 1847.* xiv

*See* ABATEMENT, 1, 2.

EVIDENCE, 2.

INTERROGATORIES.

MASTERS IN ROTATION.

PRODUCTION OF DOCUMENTS, 5.

### MASTER'S REPORT.

The Master made a report not strictly following the order of reference, but, no objection or exception having been taken thereto, it had been confirmed. A party to the suit afterwards petitioned, on the ground of the informality, to discharge the orders *nisi* and absolute confirming the report, but it was dismissed. *Armstrong v. Storer.* 277

### MASTER OF THE ROLLS.

*See* JURISDICTION, 1, 2.

ORDER OF COURSE, 3.

### MISNOMER.

*See* JUDGMENT.

### MONEY.

## MONEY.

The word "money" by itself, in a will, means money strictly and nothing else, but when used in connection with other words, it may have a much more extended signification. *Glendening v. Glendening*. Page 324

## MORTGAGE.

An estate was mortgaged to *A.*, who sub-mortgaged it to *B.* *A.* devised the estate to *C.*, and bequeathed to *B.*, the sub-mortgagee, through his executors, 1000*l.* to clear in part the estate. The sub-mortgagee, after the death of the testator, foreclosed the estate. Held, that the devisee of the estate was entitled to the 1000*l.* *Lockhart v. Hardy*. 379

See CONDITION.

DISCLAIMER.

## MORTGAGOR AND MORTGAGEE.

1. After foreclosure, the mortgagee fairly sold the estate for less than what was due to him. Held that he could not afterwards recover from the mortgagor, upon his collateral personal securities, the amount still remaining unpaid. *Lockhart v. Hardy*. 349
2. Where a debt is secured by mortgage, covenant, and bond, the mortgagee may pursue all his remedies at the same time. If he obtain full payment on the bond or covenant, the mortgagor be-

comes entitled to the estate, but if he obtain part payment only, he may go on with his foreclosure suit and foreclose for the remainder. On the other hand, if he forecloses first, and the value of the estate proves insufficient to satisfy the debt, he may, while the mortgaged estate remains in his power, sue on the bond or covenant, but he thereby opens the foreclosure, and the mortgagor may thereupon redeem. *Lockhart v. Hardy*. Page 349

See PRODUCTION OF DOCUMENTS, 2.

TAXATION, 5.

## MORTMAIN.

1. Shares in gas light and in a dock company, which possessed real estate for the purposes of their undertaking, Held, not within the Statute of Mortmain. *Sparling v. Parker*. 450
2. Canal shares, which, by act of parliament, were declared to be personal estate, and transmissible as such, Held, by Sir *John Leach*, to be within the Mortmain Act. *Tomlinson v. Tomlinson*. 459

## MOTION.

See ISSUE, 1, 2, 3.

SOLICITOR AND CLIENT, 3, 4, 7.

STAYING PROCEEDINGS PENDING APPEAL.

## MUNICIPAL

MUNICIPAL CORPORATION.

1. Liability of the new municipal corporations and the rate-payers of their boroughs for the breaches of trust of the old corporations, and the costs of obtaining redress. *The Attorney-General v. The Corporation of Leicester.* Page 546
2. The new corporations succeed to the debts and duties of the old corporations, whose place they now occupy, as well as to their estates, property, and rights.

*Ibid.*

NEXT FRIEND.

*See* LUNATIC, 1.

NEXT OF KIN.

1. Upon an ultimate limitation to a testator's next of kin, Held, that the next of kin at the testator's death, and not those at the time when such ultimate limitation took effect, were entitled. *Seifferth v. Badham.* 370
2. Where, after specific limitations, a testator gives his property to his next of kin, much weight is not to be attached to that, which is supposed to be the testator's intention in favour of or against particular persons as his next of kin; for infinite variations may take place in that class between his will and his death. It is probable, that a testator, in such cases, means to provide for particular

persons, and then adds that, if they fail, then the law may take its course. *Seifferth v. Badham.*

Page 370

3. A testator gave his residuary estate to his daughter for life with remainder to her children, and in default to his next of kin. Held, that the class of next of kin was to be ascertained at the testator's death. *Lasbury v. Newport.* 376

NOTICE.

1. On a question of priority of incumbrances on shares, notice to one of a Joint Stock Company is not notice to the Company. *Martin v. Sedgwick.* 333
2. *A.* held shares as trustee and executed a declaration of trust, but no notice was given at the office of the Company. *A.* afterwards mortgaged his shares to secure his private debt. Notice of this mortgage was given to the Company, and was entered in their books. Held, that the mortgagee had priority over the *cestui que trust.* *Ibid.*

ORDER AND DISPOSITION.

*See* BANKRUPTCY, 1.

ORDER OF COURSE.

1. An order of course for referring exceptions for insufficiency, obtained within the proper limit as to time, but amended after its expiration, discharged for irregularity. *Wool v. Townley.* 41
2. An

2. An order of course may be amended before service, but *semble*, that after service it cannot be amended in the absence of the party to be affected thereby.

Page 41

3. In discharging an order of course attached to another Court the Master of the Rolls has not authority to direct the costs to be costs in the cause. *Ibid.*

See AMENDMENT, 6, 7.

#### PARTIES.

1. Husband and wife sued, amongst other things, for an account of the rents of her copyhold estate. The wife died. Held, on demurrer, that it was not necessary to make her personal representative a party to a bill to revive the suit. *Jones v. Skipworth.* 237

2. *A. B.*, being in embarrassed circumstances, conveyed property to trustees to sell and pay his creditors (parties thereto) in proportion. *A. B.* afterwards instituted a suit against one of such creditors for the purpose of taking the accounts of such creditors, and to cut down the estimated amount of his debt. The other creditors were served with copy bill. Held, that as the other creditors were bound by the proceedings, the suit was not imperfect for want of parties, and a decree was made, without prejudice to the right of the other creditors to any sum which the Plaintiff might recover on

taking the accounts. *Clarke v. Tipping.* Page 284

3. A fund was alleged to have been carried in an administration suit, "to a separate account, intituled the general account." In another suit, to give effect to the assignment of a share of the fund, Held, that the legal personal representative of the testator was a necessary party. *Salmon v. Anderson.* 445

4. The ultimate limitation of a legacy was to a party's "personal representatives or next of kin." Held, that both classes must be made parties to a suit affecting the fund. *Ibid.*

See SUPPLEMENTAL BILL.

#### PARTIES TO CONVEYANCE.

See VENDOR AND PURCHASER, 1. 6.

#### PARTNERSHIP.

See LIEN.

#### PAUPER.

A party being in possession and enjoyment of the property in question, which was worth 140*l.*, and 10*l.* a year, dispaupered. *Taprell v. Taylor.* 493

#### PAYMENT.

An absolute vested bequest was accompanied with a direction, that it should not be delivered till the legatee attained twenty-five. Held, that he was entitled to payment on attaining twenty-one. *Rocke v. Rocke.* 66

#### PAYMENT

**PAYMENT INTO COURT.**

Taxation of a bill was directed on the terms of paying a sum of money into Court. The fund accumulated. Held, that the solicitor was not entitled to the stock and the benefit of the accumulations, but that the whole must be sold and the produce applied in part discharge of the bill. *In re Smith.* Page 342

**PAYMENT OUT OF COURT.**

When payment out of Court is asked of money belonging to a married woman, an affidavit that the fund is not settled is insufficient. It must be shewn either that there is no settlement, or what the settlement was. *Britten v. Britten.* 143

**PETITION.**

1. A direction for the Master to settle a conveyance omitted in a decree was supplied by petition. *Trevelyan v. Charter.* 140
2. The petition of a person not a party to the cause must state his residence, otherwise it cannot be heard. *Glazbrook v. Gillatt.* 492

*See Costs, 7.*

**REHEARING, 2.**

**PETITION OF RIGHT.**

It is not competent to the king, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right. *Semble. Ryves v. The Duke of Wellington.* 579

*See PROBATE.*

**PIN MONEY.**

There is annexed to wife's pin-money an implied duty of applying it towards her personal dress, decoration, and ornament. *Jodrell v. Jodrell.* Page 45

**PLEADING.**

1. It is perfectly settled, as a general rule, that a pecuniary legatee is not a necessary or proper party to a bill for an account of the personal estate. It is the duty of the executors to protect the estate against improper demands. *The Marquis of Hertford v. The Count and Countess de Zichi.* 11
2. But where a question directly occurred between the residuary legatee and a pecuniary legatee, which it was found impossible to determine in a general administration suit, and a suit was afterwards instituted by the residuary legatee against the pecuniary legatee and the executor to determine it, a demurrer by the pecuniary legatee, on the ground that he had improperly been made a party, was, under the special circumstances, overruled. *Ibid.*

*See ANSWER, 1.*

**BREACH OF TRUST, 2.**

**DECREE, 2.**

**DEMURRER, 2, 3, 4, 5.**

**DISCOVERY, 3.**

**FURTHER DIRECTIONS.**

**JOINT STOCK COMPANY.**

**PARTIES, 1.**

**PETITION.**

**SUPPLEMENTAL BILL.**

**POWER**



## POWER OF ATTORNEY.

*See* DEED POLL.

## PRACTICE.

*See* ABATEMENT, 1, 2.

AFFIDAVITS.

AMENDMENT, 2, 3. 5. 7.

ANSWER.

BILL.

BREACH OF TRUST, 2.

CLERKS OF COUNSEL.

COPY BILL.

COSTS, 7. 11.

DECREE, 3.

DEMURRER, 1.

DISMISSAL FOR WANT OF  
PROSECUTION.

EVIDENCE, 3.

EXCEPTIONS.

GENERAL ORDERS.

INJUNCTION.

INTERROGATORIES, 1, 2.

JURISDICTION.

MASTERS IN ROTATION.

MASTER'S OFFICE.

MASTER'S REPORT.

ORDER OF COURSE, 1, 2.

PAYMENT.

PETITION, 2.

PRODUCTION OF DOCUMENTS.

RECEIVER, 2, 3.

REHEARING, 1, 2.

SEPARATE ACCOUNT.

SOLICITOR AND CLIENT.

STATUTE, 1.

STAYING PROCEEDINGS PEND-  
ING APPEAL.

STOP ORDER.

TAXATION.

TAXING MASTER.

## PRELIMINARY ENQUIRIES.

*See* PRODUCTION OF DOCUMENTS, 5.

## PREROGATIVE.

*See* PETITION OF RIGHT.

PROBATE.

## PRINCIPAL AND AGENT.

Fraudulent accounts between a principal and factor opened from the beginning, the Court holding that the relief ought not under such circumstances, to be limited to a right to surcharge and falsify. *Clarke v. Tipping.* Page 284

*See* FACTOR.

## PRIORITY.

*See* COSTS, 8.

NOTICE, 2.

## PRIVILEGED COMMUNICATIONS.

*See* DISCOVERY.

PRODUCTION OF DOCUMENTS, 3.

## PROBATE.

A legatee claiming under an alleged will of *George III.* under the sign manual in pursuance of the 40 G. 3. c. 88. s. 10. against the executor of *George IV.*, alleging that *George IV.* and his executors had possessed the assets of *George III.*, and it alleged that the will had not been, and being a Sovereign's will could not be, proved. A demurrer was allowed on the ground, that until the will had been proved this Court had no jurisdiction, and  
*semble,*

*semble*, that the proper remedy against *George IV.* would have been by petition of right. *Ryves v. The Duke of Wellington.*

Page 579

PROBATE DUTY.

*See* TAXATION, 2.

PRODUCTION OF DOCUMENTS.

1. It is not the practice to order the production of documents admitted in the answer, for a limited period. *Attorney-General v. Bingham.* 159
2. A mortgagee, against whom a bill was filed by another mortgagee for redemption and foreclosure, admitted the possession of vouchers consisting of bills of exchange and promissory notes. Held, that he was bound to produce them. *Gibson v. Hewett.* 293
3. Cases and the opinions of counsel thereon, anterior to the litigation, held privileged from production. *Reece v. Trye.* 316
4. On a bill to enforce an arrangement respecting land entered into by the Defendant's father in his life, the Defendant stated, that "under a deed" of 1789, which was in the Defendant's possession, his father was tenant for life, and that from 1789, his father had no greater estate than for his life. He also stated, that he himself was tenant in tail "under" the same deed. Held, that the Plaintiff was not entitled to a production. *Wasney v. Tempest.* 407
5. An order was made directing pre-

VOL. IX.

liminary inquiries, and for the production of the necessary papers. Subsequently, an order was made for an inspection of all papers in the Defendant's possession at his solicitor's office. Held, that the latter did not supersede the former, and that the Master might still order a production in the course of the inquiries directed. *Whicker v. Hume.* Page 418

PUBLICATION ENLARGED.

*See* EVIDENCE, 2.

PUBLIC POLICY.

*See* HUSBAND AND WIFE, 1, 2.

PURCHASE MONEY.

*See* VENDOR AND PURCHASER, 4.

RAILWAY.

1. It is on the ground of a general public good, that the legislature grants to railway companies the compulsory powers of taking the property of individuals. *Gray v. The Liverpool and Bury Railway Company.* 391
2. In questions between companies and individuals whose property the former seek to take under compulsory clauses in their acts, the Court does not strain the construction of the act in favour of the former. *Ibid.*
3. When the power of fully completing a railway, according to the intention of the legislature, depends on the voluntary consent of  
T t individuals

individuals having property on the proposed line, such consent ought to be obtained by the company before they proceed in the undertaking. *Gray v. The Liverpool and Bury Railway Company.*

Page 391

4. Whether, where it is evident that the line of a railway cannot be fully completed, the company have a right, compulsorily, to take any part of the property in the proposed line. *Quære. Ibid.*

#### REAL AND PERSONAL ESTATE.

##### See CHARGE ON REAL ESTATE.

#### RECEIVER.

1. An adverse application was made against a Receiver, by a party to the cause, which was refused with costs. The applicant being wholly unable to pay the costs: Held, that the receiver was entitled to be indemnified, and have his costs, as between solicitor and client, out of the fund in hand belonging to incumbrancers. *Courand v. Hanmer.* 3
2. A Receiver will not be appointed where the rights, as between the Plaintiff and Defendant, are doubtful, if the Defendant has obtained the legal estate without fraud, and no case of danger as to his security is alleged. *Lancashire v. Lancashire.* 120
3. The Plaintiff sued as heir, and the answer neither admitted nor denied that he held that character: held

that this alone was not a sufficient ground for refusing a Receiver. *Lancashire v. Lancashire.*

Page 120

4. A husband contracted for a lease of some premises, and he afterwards induced the trustees of his marriage settlement, who held monies for the separate use of his wife, without power of anticipation, to act in breach of their trust, and to purchase the property. The property was conveyed to the trustees, and, by a deed executed by the husband and wife, it was declared that it should be held for their indemnity and on the trusts of the settlement. The husband laid out very considerable sums of money in building and repairs, and, with the consent of the wife, was permitted to receive the rents. After some years, disputes arose; the trustees insisted on receiving the rents, and proceeded at law to enforce their rights; whereupon the husband filed a bill against the trustees and his wife, claiming a lease under the agreement, and asking for a sale of the property, and for the application of the produce, first, in replacement of the trust funds, and afterwards, in reimbursing the Plaintiff his outlay. A motion for a receiver was refused with costs. *Wiles v. Cooper.*

294

5. A receiver of a moiety of an estate claimed by the Plaintiff as tenant in common with the Defendant who was in possession of the whole, granted under the circumstances.

cumstances. *Hargrave v. Hargrave.* Page 549

REFERENCE OF EXCEPTIONS.

*See* EXCEPTIONS, 4, 5.

REFORMING DEED.

*See* USURY.

REHEARING.

1. Generally, the Court leaves the question of rehearing to the certificate of counsel, reserving, nevertheless, its power and jurisdiction, and if the order to rehear be obtained under such circumstances, or in such a manner, that any party has a right to complain, the proper proceeding is to apply to take the petition off the file. *Gwynne v. Edwards.* 22
2. Where a person, not a party to the suit, is desirous of obtaining a rehearing, he must apply for leave to present a petition to rehear. *Ibid.*

RELEASE.

*See* SOLICITOR AND CLIENT, 8, 12.

REMOTENESS.

Bequest to *A.* for life, with remainder to her children, who should attain twenty-five, with a clause for maintenance during minority, and for accumulation of surplus income. Held, that the gift to the children was not void for remoteness. *Marquis of Bute v. Harman.* 320

RESCINDING CONTRACT.

*See* VENDOR AND PURCHASER, 5.

RESIDUE.

A testator bequeathed to his wife the interest of his money and the use of his goods for life; at her death he gave certain legacies and the remainder of his property to his brothers and sisters. Held, that the widow was entitled to the residue for life. *Glendenning v. Glendenning.* Page 324

REVERSION.

*See* SETTLEMENT.

REVIEW.

*See* CREDITOR'S SUIT, 1.

REVOCATION.

*See* MARRIAGE SETTLEMENT, 1, 2.

SEPARATE ACCOUNT.

In order to save the expense of serving different parties, an inconsiderable aggregate fund was ordered to be severed and carried over to separate contingent accounts. *Handley v. Metcalfe.* 495  
*See* PARTIES, 3.

SEPARATE USE.

*See* APPROPRIATION OF PAYMENTS.

T t 2 SEPARATION.

## SEPARATION.

See DEED, 2.

HUSBAND AND WIFE, 2.

## SETTLED ACCOUNT.

See PRINCIPAL AND AGENT.

SOLICITOR AND CLIENT, 8.  
10, 11, 12.

## SETTLEMENT.

Upon the marriage of a ward, the intended husband proposed to settle the whole of her fortune. The Master, in ascertaining her fortune, omitted to state a reversionary interest. Her property was settled omitting the reversionary interest, and the husband covenanted to settle any property to which the wife or he, in her right "should at any time during the marriage" become entitled. Held, that the reversionary interest ought to be settled. *Marquis of Bute v. Harman*.

Page 320

See PAYMENT OUT OF COURT.

## SHARES.

See MORTMAIN, 1, 2.

## SOLICITOR AND CLIENT.

1. A solicitor is not bound to disclose professional communications which took place between himself and his client, although no litigation existed or was contemplated at the time. *Carpmael v. Powis*.

16

2. The same rule applies to similar communications between the solicitor and a third party, who acts as the medium of communication between the solicitor and client. *Carpmael v. Powis*. Page 16
3. On the application of Defendant's counsel, a motion stood over. When it came on again, it appeared that the Defendant had since changed his solicitor, but *without order*, and no counsel then appeared for him. The motion was granted on an affidavit of service. *Davidson v. Leslie*. 104
4. A party had some time since left home, and had not been heard of, and it was not known whether he was living or dead. His solicitor ceased to act for him, but no order had been made for changing solicitors. Held, that notices served on such solicitor were regular. *Wright v. King*. 161
5. A solicitor's *lien* upon the fund is not a general lien. It extends only to costs in the cause, and costs immediately connected with costs in the cause; as, for instance, the costs of successfully protecting a solicitor's right to the costs in a cause. *Lucas v. Peacock*. 177
6. In drawing up a decree, the word "inquiry" was erroneously inserted for the word "sale." It became necessary for the Defendant to make an application to correct the error. Held, that the solicitor of the Defendant must bear the costs. *In re Bolton*. 272
7. After considerable delay in the pro-

prosecution of a suit, the solicitor of a deceased party was served with a notice of motion. Held, that his duty to the Court rendered it proper for him to appear on the motion. *Chalie v. Gwynne*.

Page 319

8. A trustee, who was a solicitor, came to a final settlement of accounts with his *cestuis que trust*, and thereupon a general release was executed. In the accounts, the trustee had taken credit for bills of costs for professional services, to which, under the general rule, he was not entitled. The *cestuis que trust* were assisted on the occasion by an independent solicitor, who perused the bills, and settled and attested the release. Held, under the circumstances, that the trustee was entitled to the benefit of the release. *Stanes v. Parker*. 385

9. A solicitor, on payment of his costs, undertook to deliver his bill, but he neglected. On a petition presented more than twelve months after, the Court, under its general jurisdiction, ordered the delivery with costs. *In re Foljambe*. 402

10. An account settled, and a security taken by a solicitor from his client, though to be viewed with jealousy, is not to be treated as a nullity. *Jones v. Roberts*. 419

11. A solicitor and client settled an account, and the client gave a mortgage and covenant to pay. The solicitor sued on the covenant, and the client filed a bill,

impeaching the transaction on the ground of surprise, undue influence and error. This being denied by the answer, a motion for an injunction to stay proceedings on the covenant was refused.

*Jones v. Roberts*. Page 419

12. On a settlement of account between a *cestui que trust* and trustee (a solicitor), the latter charged for professional services in the trust. A release was executed, but the *cestui que trust* not having had any independent professional assistance on the occasion, the Court relieved him from the professional charges, beyond costs out of pocket. *Todd v. Wilson*. 486

See DISCOVERY, 3.

GENERAL ORDERS, 2.

INTEREST, 4.

PAYMENT INTO COURT.

TAXATION.

## SPECIFIC PERFORMANCE.

Where a bill for specific performance is filed by a purchaser, and it turns out that the vendor cannot make a good title, the bill is dismissed, but without costs. *Mallden v. Fyson*. 347

See HUSBAND AND WIFE, 1, 2.

VENDOR AND PURCHASER.

## STATUTE.

1. (1 W. 4. c. 60.) An infant devisee had been ordered to convey real estate sold for payment of the testator's debts. He made default, and was not amenable to process. The Court, under 1 W. 4. c. 60.

c. 60. s. 8., directed a person to convey in his place. *Thomas v. Gwynne. Thomas v. Thomas.*

Page 275

2. (3 & 4 W. 4. c. 42.) In 1816, *A.* mortgaged an estate to *B.*, and covenanted to pay the mortgage money; and, in July 1817, *A.* and *B.*, as his surety, conveyed the property to *C.*, on trust to sell and pay, first, a debt due from *A.* to *C.*, which *A.* and *B.* also covenanted to pay; and, secondly, to pay *B.*'s debt. In August following, *A.* executed to *B.* an equitable charge on other property. In 1834, *C.* sold the estate, and applied the produce in part payment of his demand. In 1842, a bill was filed by *B.* against *A.* to realise the equitable charge. Held, that, until the trust of the deed of July 1817 was exhausted in 1834, the covenant in the deed of 1816 subsisted, wholly unaffected by time; that the debt and the personal remedy to recover it subsisted, at the time the bill was filed, and that the equitable charge was therefore then operative. *Bennett v. Cooper.* 252
3. (1 & 2 Vict. c. 110. s. 61.) A judgment was obtained against a party under a warrant of attorney. He afterwards took the benefit of the Insolvent Debtor's Act. Held, that the judgment creditor was a necessary party to the conveyance of the insolvent's real estate to a purchaser, notwithstanding the 1 & 2 Vict. c. 110. s. 61. *Hotham v. Somerville.* 63

27 Eliz. c. 20. See TRUST.

9 G. 2. c. 36. See MORTMAIN.

40 G. 3. c. 88. See PROBATE.

1 W. 4. c. 47. See VENDOR AND PURCHASER, 4.

6 & 7 Vict. c. 73. See TAXATION.

7 & 8 Vict. c. 111. See BANKRUPTCY, 2.

#### STATUTE OF LIMITATIONS.

See DEMURRER, 6, 7.

STATUTE, 2.

#### STAYING PROCEEDINGS

##### PENDING APPEAL.

Motion by a party to a suit to stay proceeding to sell an estate pending an appeal, refused with costs, the applicant not having himself appealed. *Rowley v. Adams.*

Page 348

#### STOP ORDER.

1. A stop order does not affect any right, and it is therefore unnecessary to specify that it is made "without prejudice." *Lucas v. Peacock.* 177
2. Stop order directing that a tin box in Court, containing turnpike securities, should not be parted with without notice to the petitioner. *Williams v. Symonds.* 523
3. A petition for a stop order was served not only on the assignor, but on the other parties to the cause. The petitioner was ordered to pay the costs of the latter. *Glazbrook v. Gillatt.* 611

#### SUBSTITUTED SERVICE.

See COPY BILL.

SUP.

SUPPLEMENTAL BILL.

A suit was instituted by legatees, whose interest (upon the happening of a contingency) might vest in the next of kin, against the executors alone. The next of kin were brought before the Court by supplemental bill. Held, that the executors were not improper parties to such supplemental bill. *Parker v. Parker.* Page 144

SURVIVORSHIP.

Bequest to one for life, with remainder over to two others, with a clause of survivorship "if one or the other (of the latter) should die." Held, that the survivorship had reference to the death of the tenant for life, and not to that of the testator; and one of the remaindermen having survived the testator, but predeceased the tenant for life, the survivor was held entitled to his share by survivorship. *Whitton v. Field.* 369

TAXATION.

1. As to what items of disbursement are properly included in a bill of costs. *In re Bedson.* 5
2. Legacy and probate duties estimated at 140*l.*, were payable, in order to make available certain funds in Court. The solicitor, at the request of the client, engaged to pay them, and took a charge on the funds for 140*l.* and in-

terest. The duties, amounting to 78*l.* only, were paid by the solicitor. Held, that that sum formed a proper item in his account on the taxation of his bill of costs.

*In re Bedson.* Page 5

3. The single fact that, upon a transfer of a mortgage, a mere draft bill of costs of the mortgagee's solicitor is, for the first time, produced and then paid, is not of itself, without proof of pressure or fraud, a sufficient "special circumstance" to authorize taxation after payment, nor is that fact sufficient coupled with overcharges which are not so gross as to evidence fraud. *In re Fyson.* 117
4. The taxation (under the 6 & 7 *Vict. c. 73.*) of a solicitor's bill at the instance of a third party "liable to pay" is regulated by the relations existing between the solicitor and his client, and not as between the solicitor and such third party. *Ibid.*
5. Petition by mortgagor for taxation of the mortgagee's solicitor's bill, presented five months after it had been discharged by retainer, dismissed with costs, on the ground that it neither alleged any circumstances of pressure, nor any specific items of overcharge. *Dunt v. Dunt.* 146
6. The fact of a petition being unopposed, is not, of itself, a sufficient reason for the disallowance of the costs of two counsel. *Sturge v. Dimsdale.* 176
7. Costs of two counsel, upon a petition of a retiring trustee for a reference



- reference to appoint a new trustee, and of a petition to confirm the Master's report, allowed, under the circumstances. *Sturge v. Dimsdale.* Page 176
8. Where the taxing-master has received no special directions from the Court, in regard to payments made by a client to his solicitor, it is his duty to confine himself to simple payments plainly proved to have been made on account of the bill of costs. *In re Smith.* 182
9. In ascertaining what is due on bills of costs, and in the consideration of what payments have been made on account of them, questions of law and fact of considerable difficulty may incidentally arise, and may possibly justify and require discussion and determination, even in the jurisdiction exercised by the Court on petitions for taxation. *Ibid.*
10. An order was made for the division and transfer of a fund in Court, but before it could be completed, the fund became altered, and the solicitor presented a petition for a similar object. Held, that it could not be considered as unnecessary, it appearing that the solicitor using his best exertions, was unable to act on the first order, by reason of a difficulty as to the legacy duty; the solicitor was therefore allowed the costs upon taxation. *In re Bedson.* 187
11. Expedition money, paid by a solicitor to a stationer or writing clerk employed in the Registrar's office, disallowed upon taxation. *In re Bedson.* Page 187
12. A gratuity paid to the clerks of the Accountant-General's office was disallowed to the solicitor on taxation, as was also a fee paid upon bespeaking an order for transfer which could not be made available. *Ibid.*
13. A solicitor acting for a third mortgagee, negotiated for a transfer of the first mortgage, and had proceeded so far as to send the drafts. He took a journey into the country to complete the matter, which proved fruitless, and having previously received an intimation that the second mortgagee had already obtained a transfer of the first mortgage, the costs of the journey were, on taxation, disallowed, on the ground that, after that intimation, he ought to have obtained his client's sanction before incurring the expense. *In re Price.* 234
14. A mortgagee's solicitor retained the amount of his bill of costs out of the produce of the sale of the mortgaged estate, and he charged the amount in an account delivered to the mortgagor. Held, that an order for taxation within twelve months might be obtained as of course, and a special petition having been presented for that object, the order was made, but the petitioner was ordered to pay the costs. *In re Bignold.* 269
15. A solicitor having knowingly, in his bill of costs, fixed the rate of his charges for business, cannot after-

afterwards, on a taxation, be allowed to increase it. *In re Walters.* Page 299

16. Pending a taxation, leave given, upon special application, to carry in an additional bill for specified items of undercharge and omission arising from error and mistake. *Ibid.*

17. The delivery by a client, of a bill or note held under the circumstances to amount to a payment of a bill of costs. *In re Currie.*

18. The "special circumstances" under which a paid bill may be taxed, are such as exist or take place at the time of payment, or such as appear on the face of the bills themselves, where payment is extorted, and there are improper charges even of a small amount, or where the charges are so gross as to evidence fraud and oppression, taxation will be directed after payment. *Ibid.*

19. It is imprudent for a client to pay, and for a solicitor to receive his bill of costs so closely upon their delivery, that they cannot have been deliberately and carefully perused and examined by the client, but this alone is not sufficient to warrant a taxation after payment. *Ibid.*

20. Petition for taxation dismissed, but, under the circumstances, without costs. *Ibid.*

See COSTS, 4.

INTEREST, 4.

PAYMENT INTO COURT.

TAXING MASTER.

## TAXING MASTER.

The Court having determined to communicate with the Taxing Master as to a proceeding in his office, declined to receive an affidavit tendered by the parties, of what had there taken place. *Sturge v. Dimsdale.* Page 170

## TENANT FOR LIFE AND RE-MAINDERMAN.

Tenant for life, held, upon the terms of the will, entitled to the actual income made of the testator's property invested in mortgages and shares, from the time of the death until the conversion. *Sparling v. Parker.* 524

## TENANT IN COMMON.

See RECEIVER, 5.

## TITLE.

See VENDOR AND PURCHASER, 3.

## TITLE DEEDS.

See PRODUCTION OF DOCUMENTS, 4.

## TRIAL.

See ISSUE, 1.

## TRUST.

The statute of the 27 Eliz. c. 20. authorized the corporation of *Plymouth* to construct a watercourse or conduit, for bringing a supply of fresh water from a distance to *Plymouth* for public objects, as for the supply of the ships and town and to scour the haven. Mills

Mills were erected on the watercourse, and the corporation afterwards conveyed away a portion of their interest in the leat: — Held, that the corporation had undertaken the performance of a public trust, and could not divest themselves of the means of fully executing it; that the primary duty of the corporation was to provide for the public objects contemplated by the act; and that the surplus water only, after satisfying the public purposes, could be applied to the use of the mills. The Court also considered it to be doubtful, whether the corporation could alienate the watercourse, or any part, for satisfying their own debt. *Attorney-General v. The Corporation of Plymouth.*

Page 67

See VENDOR AND PURCHASER, 2.

#### TRUSTEE.

1. If a trustee be sued in Chancery for an account, and it appears that he has properly expended sums of money for the protection and safety, or for the maintenance and support, of his *cestuis que trust* at a time when he, though adult, was incapable of taking care of himself, the Court will allow him credit in account, for such sums of money. *Nelson v. Duncombe.*  
211
2. A trustee, who was a solicitor, came to a final settlement of accounts with his *cestuis que trust*; and thereupon a general release

was executed. In the accounts, the trustee had taken credit for bills of costs, for professional services, to which, under the general rule, he was not entitled. The *cestuis que trust* were assisted on the occasion by an independent solicitor, who perused the bills, and settled and attested the release. Held, under the circumstances, that the trustee was entitled to the benefit of the release.

*Stanes v. Parker.* Page 385

3. A testator gave power to his trustees, to become lessees of the trust property. One of them availed himself of it, and the other trustee did not actively interfere in the management of the trust. The trustee-lessee was removed by the Master of the Rolls, at the instance of the *cestuis que trust* on the ground of the inconsistency of his duties of lessee and trustee, and upon appeal on that and other grounds. *Passingham v. Sherborn.* 424
4. A bill contained allegations of great fraud against trustees which all failed. The trustees were removed, but not, however, on the ground of misconduct. Held, that they were entitled to the costs of the whole suit. *Ibid.*
5. On a settlement of account between a *cestui que trust* and trustee (a solicitor), the latter charged for professional services in the trust. A release was executed, but the *cestui que trust* not having had any independent professional assistance on the occasion, the Court

Court relieved him from the professional charges beyond costs out of pocket. *Todd v. Wilson*.

Page 486

See BREACH OF TRUST, 1. 2,  
FINE, 1, 2, 3.  
INDEMNITY.  
RECEIVER, 4.  
STATUTE, 1.

### USURY.

The Plaintiff lent the Defendant a sum of money on his bond and an equitable deposit. The bond, on the face of it, was usurious, and an action having been brought on it, the Plaintiff failed. The Plaintiff afterwards came into equity, shewing that the bond had been erroneously prepared; and that, in fact, the contract was not usurious, and praying that the instrument might be reformed, and effect given to his equitable deposit. The Court, being satisfied of the error, held, that the Plaintiff was entitled to the relief he asked. *Hodgkinson v. Wyatt*. 566

### VENDOR AND PURCHASER.

1. A judgment was obtained against a party under a warrant of attorney. He afterwards took the benefit of the Insolvent Debtors Act. Held, that the judgment creditor was a necessary party to

the conveyance of the insolvent's real estate to a purchaser, notwithstanding the 1 & 2 Vict. c. 110. s. 61. *Hotham v. Somerville*.

Page 63

2. A hospital having a corporate character, was established in close connection with a municipal corporation. The ex-mayor was to be the governor, the masters and assistants were elected from the corporation, and the mayor and aldermen were visitors:—Held, that the corporation and hospital were, in equity, incapable of contracting, and a purchase by the corporation of property belonging to the hospital was set aside. *Attorney-General v. The Corporation of Plymouth*. 67

3. Upon the sale of a leasehold for lives, expressed to have been granted by a corporation in consideration of the surrender of a prior lease, the title to the surrendered lease must be shewn. *Hodgkinson v. Cooper*. 304

4. An estate was sold to a party to a suit, for payment of the testator's debts, and which, by the disclaimer of a trustee, was vested in the heir *pur autre vie*, with legal remainder to the children of A. (who was living) as tenants in common. The purchase-money was in Court. The case appeared not to be within the 1 W. 4. c. 47., so that no effective conveyance could be made until the death of A. Held, that the purchase-money ought not to be distributed. *Heming v. Archer*. 366

5. Though

5. Though time may not be of the essence of the contract, yet, upon unreasonable delay on the part of a vendor in completing, the purchaser, upon giving notice, may rescind the contract. *Benson v. Lamb.* Page 502

6. It being one of the terms of a contract between vendor and purchaser, that certain parties were to join in the conveyance, the Court would not enter into the question, whether they were necessary or proper parties. *Ibid.*

See SPECIFIC PERFORMANCE.

#### VESTING.

A testator gave his real and personal estate, after paying four annuities, to one for life, and after his death, he directed his personal, and the produce of his real, estate to be divided amongst the children of A. living at the testator's death, when the youngest attained twenty-one, if the annuitants should be then dead; but if not, then his trustees were either to invest it and pay and apply the residue of the income in the maintenance, &c. of the children, according to their discretion, or accumulate, such accumulations to be paid, after the death of the surviving annuitants, with the original shares.

There was a gift over in the event of the death of any child who should become entitled to a distributive share before his share

became "payable." One of the children predeceased an annuitant. Held, nevertheless, that the bequest was vested, and that the gift over did not take effect. *Butterworth v. Harvey.* Page 130

#### VICE-CHANCELLOR.

See JURISDICTION, 1, 2.

#### WARD.

See SETTLEMENT.

#### WILL.

See ABSOLUTE INTEREST, 2, 3.

ANNUITY.

CHARGE ON REAL ESTATE.

CONDITION.

EVIDENCE, 1.

INTEREST, 1, 2, 3.

ISSUE, 4, 5.

LEGACY.

LIFE INTEREST.

MONEY.

MORTGAGE.

MORTMAIN.

NEXT OF KIN, 1, 2, 3.

PAYMENT.

PROBATE.

REMOTENESS.

RESIDUE.

SURVIVORSHIP.

TENANT FOR LIFE AND RE-  
MAINDERMAN.

TRUSTEE, 3.

VESTING.



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